# INDIAN GOVERNMENT

## *Its Meaning in Practice*

**Frank Cassidy and Robert L. Bish**

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by

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and
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# Foreword

A federal system may be built along either (or both) of two tracks. It may be constructed from the top down, through a process of discussion based upon general principles and constitutional negotiations. Or it may create itself from the bottom up, emerging simply from growing acceptance of practical mechanisms and structures for decision-making and service delivery—that is, through practice.

In the case of Indian governments in Canada, the aboriginal constitutional process, outlined in Senator Lowell Murray's account circulated in the February 1988 issue of this Institute's publication *Choices*, seems momentarily at a standstill.

This book, however, offers an account of the latter process, still very much alive and active—a process through which Indian governments are reasserting their powers and redefining themselves in relation to their responsibilities and their citizens.

Such an account is important in several respects. First, as part of an effort to understand processes of governance in a rapidly changing world, it deals with one of the outstanding ethical and constitutional challenges for Canadians as we enter the third millenium—the challenge of coming to grips with the roles of First Nations who governed themselves in this territory before Europeans arrived and assumed power.

Second, as part of the challenge of structuring a sustainable society, the traditions of governments that have in the past lived in harmony with the earth may have much to teach about relationships with the land and might offer hope for survival.

And third, as part of the challenge of accommodating within a Canadian constitution an inevitable diversity of perspectives and cultures, it may bring us all closer to the central issues of Canadian citizenship which must be resolved if any Canadian nation is to survive in the new world of global relationships.

This study underlines the fact that there can be no solution based on waiting for the emergence of a dominant central structure able to sit at the table to express "what Indians want." Native cultures and governments exhibit a variety and diversity at least as great as all the other cultures and regional or ethnic groupings that make up Canada. What is fascinating about this present work is what it says about the lively process presently in train to create governing structures in fact, in practice, reflecting this inevitable diversity of views and contexts, even as efforts to identify relevant overarching constitutional principles continue in parallel.

While this book deals with Native communities, much of what it teaches reflects the growing importance of community development in the functioning of nation-states more generally, the emergence of constitutional forms accommodating greater diversity, and contemporary concerns with a transformation to a more sustainable society.

It remains, however, very much a first step only in a field still largely to be explored. This Institute is proud of the lead it has offered thus far in promoting research on questions of self-government. By exploring these questions as concrete pragmatic concerns, this study may help to defuse and demystify some topics which are at present unnecessarily controversial, and which generate unwarranted fears in some segments of the community. It may therefore help to bring about the progress which is possible, in practice, in the near term, and the further progress in principle, which is essential in the longer run.

The Institute wishes to acknowledge, with thanks, the financial support of the Department of Indian and Northern Affairs, Canada for the development of the background paper that was the basis for Chapter 6 of this book. We also acknowledge the support, cooperation, and advice of the many officials and others associated with the design and conduct of this study, as noted in the authors' acknowledgements which follow.

Native peoples are at present creating their own governments, in principle as well as in practice, on the basis of claims of inherent political rights as well as the recognition due to distinct cultures. While much attention is focused on the courts as a forum to help define these rights, a very significant process of gradual accretion of jurisdiction and authority is working itself out, with much less notice or attention, through daily pressures on the apparatus of regulation, taxation, and service delivery.

Canadians, engaged in attempting to construct a sustainable society within a constitution that accommodates diversity and permits effective decentralization of powers, must pay greater attention to ongoing efforts to define the character and significance of Indian governments in Canada. This book, the Institute hopes, provides a foundation for greater understanding of that story.

Rod Dobell
President
Institute for Research on Public Policy

# Avant-propos

Il est possible de bâtir un système fédéral suivant l'un ou l'autre (ou les deux) de deux modèles. On peut le construire de haut en bas, au moyen de la discussion basée sur des principes généraux et des négotiations constitutionnelles. Ou bien, il peut se créer tout seul de bas en haut, se formant simplement par l'acceptation croissante des mécanismes et des structures nécessaires à la prise de décisions et à la fourniture de services, c'est-à-dire, par la pratique.

Pour ce qui est des gouvernements autochtones au Canada, le processus constitutionnel, dont le Sénateur Lowell Murray a tracé une esquisse qui a paru dans le numéro de février 1988 de la revue *Choix* publiée par l'Institut, semble être momentanément dans une impasse.

Ce livre, cependant, offre un compte rendu de l'autre processus, qui est toujours très viable et très actif — processus par lequel les gouvernements autochtones réaffirment leurs pouvoirs et se redéfinissent par rapport à leurs responsabilités et à leurs citoyens.

Un tel compte rendu est important pour plusieurs raisons. D'abord, en jouant un rôle dans l'effort de comprendre le processus de gouvernement dans ce monde en évolution rapide, il confronte un des plus grands défis moraux et constitutionnels qui se présentent aux Canadiens en cette aube du troisième millénaire — le défi de reconnaître les rôles joués par les premières nations qui se gouvernaient dans ce territoire avant que les Européens ne soient arrivés prendre le pouvoir.

Deuxièmement, dans le contexte du défi de bâtir une société soutenable, les traditions des gouvernements qui, au passé, vivaient en harmonie avec le monde pourraient avoir long à enseigner sur des relations avec la terre, offrant ainsi de l'espoir de survie.

Et troisièmement, dans le cadre du défi de reconnaître à l'intérieur d'une constitution canadienne une diversité inévitable de perspectives et de cultures, cet ouvrage nous sensibilisera peut-être davantage aux questions primordiales de la citoyenneté canadienne — questions auxquelles il faudra trouver des réponses si la nation canadienne veut survivre dans le nouveau monde de relations globales.

Cette étude souligne l'impossibilité d'une solution fondée sur l'espoir de voir naître une structure centrale dominante qui pourrait se présenter aux négotiations pour exprimer "ce que veulent les autochtones." Les cultures et les gouvernements autochtones reflètent une variété et une diversité au moins tout aussi grandes que toutes les autres cultures et groupes régionaux ou éthniques qui composent le Canada. Ce qu'il y a de fascinant dans cet ouvrage est ce qui y est dit par rapport au processus dynamique qui est actuellement en train de créer en fait, en pratique, des structures gouvernantes, reflétant ainsi cette inévitable diversité de perceptions et de contextes, même alors que les efforts pour identifier des principes constitutionnels prépondérants pertinents se poursuivent en parallèle.

Donc, bien que ce livre traite des collectivités autochtones, beaucoup de ce qu'il nous enseigne est le reflet de l'importance croissante, au plan général, du développement collectif dans le fonctionnement des états-nations, de l'apparition de formes constitutionnelles qui acceptent une plus grande diversité, et de la préoccupation contemporaine de former une société plus soutenable.

Toutefois, ce n'est qu'un premier pas dans un domaine qui demeure largement inexploré. Il reste encore beaucoup de travail à faire. A l'Institut, nous sommes fiers de l'avance que nous avons prise jusqu'a présent dans la promotion de la recherche sur les questions d'autonomie politique, et du fait que nous avons souligné leur importance, non seulement en tant que questions elles-mêmes, mais aussi par le fait qu'elles sont représentatives d'autres questions plus larges sur la notion de gouvernement. En explorant ces questions de façon concrète et pragmatique, cette étude aidera peut-être à désamorcer et à démystifier plusieurs situations qui sont actuellement la cause de controverses inutiles et qui engendrent des doutes injustifiés dans certains secteurs de la population. Elle pourrait donc aider à la réalisation du progrès qui sera possible, en pratique, dans un avenir proche, et au futur progrès en principe, qui sera nécessaire ultérieurement.

L'Institut voudrait reconnaître et remercier le ministère des Affaires indiennes et du Nord pour l'appui financier dont il a bénéficié dans le cadre de la réalisation de la recherche préliminaire qui a servi de base au chapitre 6 de ce livre. Nous voulons aussi exprimer notre reconnaissance à l'endroit des nombreuses personnes, cadres et autres, qui ont offert appui, coopération et conseils dans la préparation et la conduite de cette étude, comme l'ont noté plus loin les auteurs dans leurs remerciements.

Les peuples autochtones sont présentement en train de créer leur propres gouvernements, autant en principe qu'en pratique, sur la foi de revendications de droits politiques inhérents ainsi que sur celle de la reconnaissance due aux cultures distinctes. Alors que beaucoup d'importance soit accordée aux tribunaux en tant que forum ou l'on essaie de définir ces droits, un autre processus très significatif d'accroissement de compétence et d'autorité est en train de prendre forme, de façon beaucoup moins remarquée, par le biais de pressions quotidiennes sur les appareils de réglementation, de taxation et de fourniture de services.

Les Canadiens, occupés à la tentative de construire une société soutenable à l'intérieur d'une constitution qui reconnaît la diversité et qui permet une décentralisation efficace du pouvoir, doivent porter une plus grande attention aux tentatives continuelles de définir le caractère et l'importance des gouvernements autochtones au Canada. L'Institut espère que ce livre fournira une base permettant une meilleure compréhension de cette histoire.

Rod Dobell
président

# Executive Summary

Indian government in Canada is an emerging political reality. Despite the failure of the federal and provincial governments to recognize the aboriginal right to self-government in the Constitution, Indian peoples in Indian communities across the country are using their governments to meet needs such as education, health, child welfare, local services, economic development, resource management, and policing. They are raising and answering, in practice as well as principle, questions such as: "What is the meaning of citizenship for aboriginal people who are citizens of First Nations as well as citizens of Canada?" "How can the traditional political institutions of Indian peoples be reconciled with those created by Canada and its provinces?" "How can an adequate financial basis be created for real self-government?"

Based upon a variety of research approaches and focusing on nineteen case studies covering bands and tribal councils in Quebec, Ontario, Manitoba, Alberta, and British Columbia, this book is an examination of Indian government and its meaning in practice. It begins with a review of the historical background of Indian governments, putting forth the view that Indian peoples had their own governing patterns and institutions long before Europeans first came to North America. The development of Canada's Indian policy is described. At times this policy has moved toward a recognition of Indian peoples as First Nations, but it has for the most part attempted to facilitate their assimilation into the Canadian cultural and political order. Recent policies and related developments reflect this tendency.

Jurisdiction — who has the authority to govern — is a key issue in the debate concerning the meaning of Indian government. The federal and provincial position is that Indian governments can only exercise delegated powers; the Indian position is that their governments are First Nations governments with inherent and independent powers. Both positions are explored in this book, and their clash in practice as well as in principle is described.

Based on this analysis of the historical, political, and jurisdictional background to Indian government, four specific elements of governance are examined: citizenship, policy-making, service production and delivery, and finance. In relation to each of these dimensions

of government, Indian people are currently practising a significant amount of self-government. They are taking more authority and moving into a wider range of jurisdictional fields than current legislation or federal-provincial policies might indicate. As a result, there are serious conflicts at times, but there are a growing number of examples of interdependencies between Indian and non-Indian governments on matters of service production and delivery.

Specifically, the findings of this review of Indian government in practice indicate that Indian governments are:

- refining their views of what citizenship in a First Nations government means and how such citizenship can be understood within the context of the Canadian federal system;
- extending and redefining their institutions of governance, particularly in response to the traditional dimensions of Indian government and the multiple functions that many Indian governments are forced to assume;
- placing strong emphasis on the use of consensus decision-making, stressing participation of their citizens and, in particular, elders and others who know traditional ways of policy-making;
- acting as more than municipal governments, having many functions that are commonly, in the Canadian political order, seen as provincial and federal ones;
- widening their relationships with provincial and municipal governments, as they provide more services to their citizens; and
- diversifying their financial bases in many cases, while seeking more appropriate systems of intergovernmental fiscal transfers and a firmer economic base within their own communities.

In recent years, the federal government and some First Nations governments have moved toward a more comprehensive approach to self-government arrangements. A number of land claims agreements—modern treaties—have been reached. Special legislation has been created concerning the governments of the Cree and Naskapi peoples of Quebec and the Sechelt people of British Columbia. The latter two cases are explored in one of the final two chapters of this book. The evidence reviewed indicates that Indian governments can achieve much through engaging in community-based negotiations which lead to special legislation. They can also lose the flexibility they may need to deal with different governments. They can open the door further to disputes about federal and provincial powers and responsibilities.

Indian government will continue to emerge. There is little evidence that most First Nations will accept the position that the only authority they have to govern themselves is authority delegated by the federal or provincial governments. Rather, as Indian governments grow, interjurisdictional disputes may well grow. Frustration and conflict may tend to disrupt the current movement toward working cooperation between governments.

In the final chapter of this book, the authors conclude that while some advances might be achieved without further constitutional change, only the constitutional recognition and accommodation of the aboriginal right to self-government within the Canadian federal system can provide the basis for arrangements that benefit both Indian and non-Indian peoples in Canada.

# Abrégé

Les gouvernements autochtones au Canada commencent à devenir une réalité politique. Malgré le fait que les gouvernements fédéral et provinciaux ne sont pas arrivés à reconnaître dans la constitution le droit à l'autonomie politique des autochtones, les peuples autochtones, dans leurs communautés partout au pays, se fient sur leurs propres gouvernements pour subvenir à leurs besoins dans des domaines comme l'éducation, la santé, le bien-être des enfants, les services régionaux, le développement économique, la gestion des ressources et les services de police. Ils soulèvent des questions et en trouvent des réponses, en pratique et en principe: "Que signifie la citoyenneté pour les peuples autochtones qui sont à la fois citoyens des premières nations et du Canada?" "Comment peut-on réconcilier les institutions politiques traditionnelles des peuples autochtones avec celles créées par le Canada et ses provinces?" "Comment peut-on créer la base financière nécessaire à l'autonomie politique réelle?"

Se basant sur plusieurs types de recherches et se penchant sur dix-neuf études de cas sur des bandes et des conseils de bande au Québec, en Ontario, au Manitoba, en Alberta et en Colombie-Britannique, ce livre examine la notion de gouvernement autochtone et sa signification en pratique. Il commence par une révision du bagage historique des gouvernements autochtones, avançant l'idée que les peuples autochtones avaient leurs propres formes et institutions gouvernementales bien avant l'arrivée des premiers Européens en Amérique du Nord. On y décrit le cheminement de la politique canadienne à l'endroit des autochtones. Parfois, cette politique a penché vers la reconnaissance des peuples autochtones comme premières nations, mais le plus souvent, elle a tenté de faciliter leur assimilation dans l'ordre culturel et politique canadien. Des politiques récentes et autres développements ne font que refléter cette tendance.

La compétence, ou l'autorité pour gouverner, constitue une question clé dans le débat sur la signification de gouvernement autochtone. La position fédérale et provinciale est que les gouvernements autochtones ne peuvent exercer que des pouvoirs délégués; les autochtones maintiennent que leurs gouvernements sont des gouvernements des premières nations avec des pouvoirs inhérents et indépendants. On étudie les deux positions dans ce livre, et on y décrit la confrontation des deux, autant en pratique qu'en principe.

Sur la foi de cette analyse du bagage historique et politique des gouvernements autochtones et de la question de compétence, on examine quatre éléments spécifiques de gouvernement: la citoyenneté, la formation de politiques, la production et la fourniture de services, et la fiscalité. Par rapport à chacune de ces dimensions de gouvernement, les peuples autochtones ont atteint un niveau significatif d'autonomie politique. Ils exercent aujourd'hui plus d'autorité et se dirigent dans des domaines de compétences plus larges que pourraient l'indiquer la législation actuelle ou la politique fédérale-provinciale. Cette situation mène parfois à des conflits majeurs, mais on voit un nombre croissant d'exemples d'interdépendance entre les gouvernements autochtones et non autochtones en matière de production et de fourniture de services.

Précisément, les résultats de cette révision de la notion de gourvernement autochtone en pratique indiquent que les gouvernements autochtones sont en train de:

- raffiner leur perception de la notion de citoyenneté dans un gouvernement des premières nations et de la définition de cette citoyenneté dans le contexte du système fédéral canadien;
- étendre et redéfinir leurs institutions gouvernantes, particulièrement en réponse aux dimensions traditionnelles des gouvernements autochtones et les multiples fonctions que beaucoup de ces gouvernements sont maintenant appelés à remplir;
- insister fortement sur le consensus dans la prise de décisions, encourageant la participation de leurs citoyens, et surtout de leurs aînés et autres qui connaissent les moyens traditionnels de former des politiques;
- agir plus que ne le ferait un simple gouvernement municipal, remplissant beaucoup de fonctions habituellement réservées, dans l'ordre politique canadien, aux gouvernements provinciaux et fédéral;
- accroître leurs relations avec les gouvernements municipaux et provinciaux à mesure qu'ils fournissent plus de services à leur citoyens; et
- diversifier leurs bases financières dans bien des cas, tout en cherchant de meilleurs systèmes de transferts fiscaux intergouvernementaux et de bases économiques plus sûres à l'intérieur de leurs propres communautés.

Au cours des dernières années, le gouvernement fédéral et quelques gouvernements des premières nations ont développé une façon plus compréhensive d'aborder la question d'autonomie politique. Plusieurs ententes relativement aux réclamations des droits territoriaux, des traités modernes, ont été ainsi conclues. Une législation spéciale a été créée à l'endroit des gouvernements des peuples Cri et Naskapi au Québec, et du peuple Sechelt en Colombie-Britannique.

Ces deux derniers cas sont explorés dans l'un des deux derniers chapitres de ce livre. Les preuves apportées indiquent que les gouvernements autochtones peuvent accomplir beaucoup en s'engageant dans des négotiations axées sur la communauté qui mèneront à une législation spéciale. Ils peuvent aussi perdre la flexibilité dont ils auront peut-être besoin afin de traiter avec de différents gouvernements. Ils peuvent ouvrir davantage la porte aux disputes sur les pouvoirs et responsabilités fédéraux et provinciaux.

Les gouvernements autochtones continueront à apparaître. Il y a peu de chance que la plupart des premières nations accepteront la position que la seule autorité qui leur incombe pour se gouverner eux-même est celle qui leur est déléguée par les gouvernements fédéral ou provinciaux. Au contraire, il est fort possible qu'à mesure que les gouvernements autochtones accroîtront, les disputes sur le partage des compétences accroîtront aussi. La frustration et le conflit aura peut-être l'effet d'intérrompre le mouvement actuel vers la coopération viable entre gouvernements.

Dans le dernier chapitre de ce livre, les auteurs concluent que, bien qu'il sera possible de faire certaines avances sans plus de changements constitutionnels, seules la reconnaissance et l'acceptation constitutionnelles du droit des autochtones à l'autonomie politique à l'intérieur du système fédéral canadien pourront fournir la base à des arrangements qui bénéficieront autant les peuples autochtones que non autochtones du Canada.

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# Introduction

In March 1987, the last in a series of First Ministers' Conferences on aboriginal constitutional matters took place. This conference was the fourth national effort by the provincial, federal, and territorial governments and four aboriginal peoples' organizations to reach agreement on a constitutional accord concerning aboriginal rights in Canada. Since the first of these conferences, the issue of aboriginal self-government had gradually emerged as the key one. The 1987 conference failed, and it failed in large part because a group of provincial governments maintained that they could not accept an amendment to the Constitution recognizing the right to aboriginal self-government without knowing what this amendment meant. They feared, they said or implied in varying degrees, that such an amendment could be the basis for aboriginal governments assuming jurisdiction over many areas of governmental activity currently within the federal and provincial domains. Aboriginal self-government was too much of an unknown to be enshrined in the Constitution.

There was considerable irony in this expression. From one end of Canada to another, from the far North to Canada's biggest urban centres, Canada's aboriginal peoples are practising self-government in a truly diverse range of ways. They are designing and delivering their educational, health, social, housing, justice, and economic development services. They are deeply involved in managing and developing natural resources. They are taking control over their membership. As Canada's First Nations, they are confronting the most critical of political questions—questions such as: "Who are the citizens of various aboriginal governments?" "What are the jurisdictional powers of these governments?" and, "How will these governments be directed, structured, financed, and kept accountable?" Aboriginal government has assumed and is further evolving a meaning in practice that provides a clear and compelling indication of what it is and how it might affect the Canadian political fabric.

This book has two objectives. First, it is intended to provide an insight into some of these efforts, into the practical dynamics of First Nations government. Second, it is intended to show how First Nations government, as it is practised by Indian people in Indian communities, can be integrated in a practical manner with the Canadian constitutional, federal system. The focus is on one group of aboriginal peoples, the members of Canada's approximately 580 Indian bands, particularly those who are citizens of First Nations bands in Quebec, Ontario, Manitoba, Alberta, and British Columbia. Moreover, the focus is on one set of governing arrangements: band and tribal councils and closely associated groups.

Before proceeding, it is important to clarify the uses that will be made of the terms "government" and "self-government." Both terms will be used throughout, but when referring to Indian governments and the process of Indian governance, primary use will be made of the term "government." This is done because this is the way that those who talk about and analyze governments usually refer to them. One never hears the terms "Canadian self-government" or "Ontario self-government." It is assumed that these governments govern themselves. In this book, the same assumption is made in relation to Indian governments. The term "self-government" is used, in most cases, to refer to specific instances where Indian governments are working to regain powers that have been taken from them. It is also employed with reference to the recent movement for Indian self-government, as it has emerged in the 1970s and 1980s. When the term "self-government" is used, it is not meant to refer to federal or provincial programs or efforts to normalize Indian governments as "junior" governments in the existing federal-provincial system. Rather, Indian self-government, as described and analyzed here, is intended to refer to the efforts of Indian people to use governments to accomplish the social, economic, cultural, and political goals they have set for themselves.

To date, Indian government has been analyzed in terms of a few, more or less standard, approaches to the matter. For example, a good part of the work of the Institute for Intergovernmental Relations at Queen's University and that of David Hawkes, in particular, has emphasized the constitutional aspect of the question. So, too, has Michael Asch in *Home and Native Land*, as have several other writers and scholars (Swartz, Zlotkin 1983, Sanders 1983b, Barsh and Henderson). Others have focused on administration and government under the *Indian Act* and federal policies. Some of the work of Sally Weaver, Harold Cardinal, John Taylor, and many of the publications of the Research Branch of Indian and Northern Affairs Canada have provided valuable insights from this perspective.

Works, such as the books *Pathways to Self-Determination*, edited by Leroy Little Bear, Menno Boldt and T. Anthony Long, and

*Arduous Journey: Canadian Indians and Decolonization*, edited by J. Rick Ponting, have paid particular attention, in Ponting's words, "to Indian attempts to generate more power and more self-sufficiency at the grassroots level of Indian communities." Nowhere in the literature, however, has a concerted effort been made to treat the practical issues of Indian government in a comprehensive and broad ranging manner—in a way that connects very specific subjects such as fire protection and child welfare services to such fundamental questions as: "Who governs?" or "How are Indian people governed and how do they govern themselves?"

The major issues that have been treated systematically in debates and analyses of Indian government have, for the most part, focused on sovereignty, aboriginal rights, land claims, and constitutional entrenchment of self-government authority. While all of these issues are central, issue resolution has not proceeded very far because of the gap that appears to exist between these relatively general issues and the diversity of Indian government in Canada. At the same time, with much less visibility, many Indian governments and organizations have proceeded to negotiate and implement agreements with federal, provincial, and local governments, assuming responsibility for governing specific service delivery activities to accommodate their own cultural needs and preferences. Many have set out to create governing authorities to meet the needs they want to meet in the ways they want to meet them. Many have taken control of matters relating to their membership. Many have also begun to address the practical questions of governance in the context of current or anticipated land claims settlements. The result of all of these activities has been the evolution of a multifaceted approach by Indians to the government process.

At the present time, one of the greatest contributions to understanding the issues of Indian government can be made by examining Indian government from a perspective that focuses on practical issues as they must be confronted on the level of Indian governments themselves. This book takes that approach. Such an approach involves examining, for example, what kinds of specific services different Indian governments have assumed responsibility for and how management, policy, delivery, and financing decisions take place in relation to those services. It involves linking concepts such as the inherent jurisdiction of First Nations over governing activities to matters such as intergovernmental financial agreements, health service provisions, and community infrastructure services.

More specifically, a perspective that accents the meaning of Indian government in practice is based on an analysis and examples of the following:

1. how Indian governments define and implement their jurisdiction over a wide range of governing functions;
2. how Indian governments define citizenship for their own decision-making processes;
3. how Indians can be citizens of their own governments as well as citizens of provincial and federal governments simultaneously;
4. how the historical and cultural context of Indian governments affects their nature and performance;
5. how Indian governments process policy decisions;
6. how Indian governments can be organized for administration and management;
7. how policy-making for specific services by Indian governments relates to overlapping concerns of provincial, federal, and nearby local governments;
8. how services can be and actually are produced and delivered to citizens by Indian governments;
9. how Indian governments can be and are financed;
10. how individual Indians and Indian resources are treated for taxation purposes by provincial and federal governments;
11. and finally, how the Canadian constitutional federal system and Indian governments might reach a mutual accommodation.

The availability of this kind of analysis should contribute to removing much of the uncertainty about what Indian government really means within Indian communities and the Canadian federal system.

The general research approach used in this book revolves around a focus on people, in this case, Indian people who wish to resolve particular problems or achieve particular objectives as groups organized into governments. Such an approach must be viewed within a context where historical and political factors as well as the jurisdictional issues that frame these problems are identified and analyzed. As this is done, a focus is developed on the kind of institutional arrangements that may be used and actually are used by Indian peoples to articulate preferences and make policies on particular issues.

In addition, the general research approach identifies how and through what kinds of arrangements the policies of different Indian governments are implemented, particularly in terms of the services they produce and deliver. Such service arrangements may include production within their own organizations or through a variety of interorganizational agreements, ranging from joint production with other agencies to direct contracting with federal, provincial, and local governments or private organizations. In all cases, arrangements such as these must include provisions for citizen involvement to one degree or another, policy-making by citizens and their governments, administration, the delivery of services and programs, and the financing of governments. These elements of governance lie at the core of Indian government in practice.

This research approach required six specific tasks so that the manuscript could be developed. In the general order that these tasks were addressed, they were:

1. **The development of key concepts in relation to the existing literature.**

   The literature was thoroughly reviewed and a conceptual approach which could be used for generally understanding government-in-practice was adopted for use in relation to Indian governments in particular.

2. **The ongoing monitoring of general developments in relation to First Nations government and the analysis of particular issues or the activities of specific Indian governments.**

   The policies and recent initiatives of Indian and Northern Affairs Canada (INAC) and the Assembly of First Nations as well as other relevant organizations were monitored. The authors also undertook a complementary analysis of issues such as taxation, membership, jurisdiction, management training, intergovernmental financial transfers and other matters, with particular relevance to the practices of Indian government. In addition, the activities of many Indian governments were most closely followed.

3. **The identification of appropriate cases.**

   Referral, mail, phone, and visits were used to identify as full a range of appropriate cases as possible to serve as a focus for field research. A final list of cases was chosen. Several criteria were used. The major ones were: geographical location, size, the range of services delivered, and accomplishments relating to particular governing functions.

4. **The development of appropriate instruments for collecting case information.**

   Instruments were developed for dealing with each important aspect of self-government, including jurisdiction, citizenship, policy-making, administration, service production/delivery, and financing.

5. **The development of case study information.**

   On-site visits to nineteen Indian governments were made to develop a broad range of examples. Supplementary information also was obtained from appropriate provincial, local, or federal agencies where interdependencies or intergovernmental agreements were involved.

6. **Overall conceptual analysis and the development of the final monograph.**

   Case investigation results were analyzed in terms of the initial conceptual framework. All of the other available information was also analyzed in this way. The framework was adjusted slightly and the manuscript was written and circulated for reviews.

The list of the Indian governments visited for the purposes of this project is presented below. These visits provided much of the material that is included in this book, particularly in chapters two through seven. It is important to note that these visits provided the core of data, but not the only data for this project. As a result of related work, the authors have spent considerable time with Indian governments throughout North America and in particular, in British Columbia. Dr. Bish has conducted extensive research on non-Indian taxation of reserve leaseholds and service provision on Indian reserves in British Columbia (Bish 1987b). Dr. Cassidy has undertaken a study of land claims as well as the effects of the 1985 *Indian Act* amendments (Cassidy and Dale; Cassidy 1988b, 1988d). Dr. Cassidy has also spent considerable time working with Indian governments on their structures and jurisdictional arrangements (1985, 1988c, 1988e).

It is important to note that the approach taken in this book has several limitations. The authors did not intend to produce a comprehensive picture of what all Indian organizations across Canada are doing. It cannot be guaranteed either that the "best cases" or "worst cases" of Indian government are used as examples. The focus is on providing a conceptual framework with empirical examples, not an empirical analysis from which generalizations for all Indian governments can be derived. The latter approach would be useful, but it would involve a much more extensive research project than the one the current study is based upon.

It is also important to understand the context and intended outcomes of the approach the authors have taken. The development of a conceptual framework and examination of Indian government cannot focus only on Indian governments. An understanding of the jurisdictional powers, citizenship arrangements, policy development patterns, service delivery processes, and financing of Indian governments must take into account the interrelationships of Indian peoples and Indian organizations to non-Indians and other governments within the Canadian federal system. Such an analysis must in and of itself have practical implications. On such a basis, one may be able to identify actual and potential institutional arrangements that can and may lead to greater Indian government within a renewed Canadian federal system. This is the ultimate objective of this book.

## Indian Governments Visited

Alexander Band (Alberta)
Blood Tribe (Alberta)
Carrier Sekani Tribal Council (British Columbia)
Cowichan Band (British Columbia)
Cree Regional Authority (Quebec)
Dakota Ojibway Tribal Council (Manitoba)
Goodfish Lake Band (Alberta)
Kahnawake (Quebec)
Kamloops Band (British Columbia)
Nisga'a Tribal Council (British Columbia)
North Coast Tribal Council (British Columbia)
Katzie Band (British Columbia)
Nuu-chah-nulth Tribal Council (British Columbia)
The Pas Band (Manitoba)
Saddle Lake Band (Alberta)
Shuswap Tribal Council (British Columbia)
Six Nations Band (Ontario)
Squamish Band (British Columbia)
Walpole Island Band (Ontario)

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# PART I

# The Challenge of Indian Government

# 1

# The Historical and Political Context

Government starts with people, people who have problems in the course of social and economic life, problems they must solve in an authoritative and general way. Self-government takes place when people control their governments. Indian peoples in Canada traditionally enjoyed self-government long before Europeans arrived in the land. They have always had their own governments. Because there were many different Indian peoples, these governments were diverse. They were most often an integrated part of other social and economic arrangements, but they still did the things and delivered the services governments must provide.

Indian governments have been looked upon and treated by Canadian governments in a variety of ways. Canada has attempted to deal with, separate, accommodate, absorb, limit, mould, and replace Indian governments, but it has never been able to fully ignore or do away with them. Today, many Indian governments are stronger than they have been in recent history, and Indian people are asserting with renewed vigour their wishes and efforts to govern themselves. Their goal is clear. It is self-government in the fullest sense of the term; it is the use of government to foster their lives as they see fit.

Just as in the past, Canada's goal is not clear. Neither the federal nor the provincial governments have been able to determine how they will accommodate themselves to the reality of Indian governments. Instead, these governments want Indian peoples and their governments to accommodate themselves to the existing federal-provincial framework, but they are unsure about how this might take place. This circumstance is not new, but it clearly has prevented Indian peoples and their governments from assuming an appropriate place within a renewed federal system. Nevertheless, Indian government is a fact which must be understood and dealt with.

## Recognition or Assimilation: A Continuing Dilemma

Even though the phrase "Indian self-government" has come into general usage in the Canadian context only in the 1980s, Indian government is a well-established historical reality. Ever since Europeans "discovered" North America, or as the Mohawks put it, ever since the Onkwehonwe (the "original people") "discovered" Columbus, Europeans and other non-natives have encountered and dealt with Indian governments as entities requiring government-to-government relationships and agreements. This process has not been a simple one. It has been marked and, to some extent, skewed by the assumptions about aboriginal peoples that Europeans brought to their relationships with them and their governments. It has been driven by an urge on the part of non-Indians to control the land and the resources it holds.

In the Royal Proclamation of 1763, King George III asserted that it was "just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds." The King went on to declare it "Our Royal Will and Pleasure," that all lands and territories not included within the limits of the existing British Colonies be reserved, "under our Sovereignty, Protection and Dominion, for the use of the said Indians. . . ," and, he added, Indian lands could only be purchased by the Crown, "at some public meeting or assembly of the said Indians, to be held for that purpose. . . ."

The Royal Proclamation of 1763 reflected and framed the contradictory nature of Britain's and later Canada's relationships with her original peoples. By the Proclamation, King George made it clear that his government recognized that there were several "Nations" of Indians which should be dealt with as nations and that the lands in these nations could not be purchased until the King's government reached agreements with them on a nation-to-nation level, "at some public meeting or Assembly." Thus King George confirmed that relationships with Indians and matters of Indian land were international matters until international agreements creating the basis for domestic relationships could be reached. At the same time, he pronounced Indian peoples to be under "Our Sovereignty, Protection and Dominion."

As John Tobais and other students of the matter have pointed out, this duality of recognition and assimilation continued to mark the relationship of the Crown's North American colonies with their original peoples up to and beyond the time of Confederation. This duality is mirrored in the reserve system created by federal and provincial legislation. Starting in 1830, Indian settlement on reserves began under government guardianship. Reserve lands were set apart for Indians in recognition of their separateness. Reserves were also established as a way of assimilating Indian people into the property relationships and civil order of Canadian society.

Gradually, the reserve system was extended. Indian government, as the exercise of limited, federally delegated powers to govern a limited land base within reserves, was perpetuated by various federal governments (INAC, 1988). The Indian Agent came to exercise great authority. Until early in the nineteenth century, as John Taylor (1984b) has pointed out, "Indian agents were quasi-diplomatic officials under military control who worked to maintain alliances with independent Indian nations." With the establishment of the reserve system, the Indian Agents took on a new role, as they were seen to be responsible for protecting, guiding, and advising Indian bands as these groups established themselves in their new communities.

In 1867, in Section 91 (24) of the *British North America Act* (*BNA Act*) jurisdiction over "Indians and lands reserved for the Indians" was provided to Parliament. This measure took place within the context of the special relationship between Indian peoples and Canada that had been incorporated into the Proclamation of 1763. As outlined in a 1983 study for the Special Committee of the House of Commons on Indian Self-Government (the Penner Committee), "the dominant theme of this special relationship involves legal, moral, and political obligations undertaken by the Crown in administering Indian affairs."

The implications of Section 91 (24) of the *BNA Act*, and of a special relationship between Canada and its aboriginal peoples, have been the source of much controversy over time. The *Guerin* case is the most recent Supreme Court of Canada case to examine the legal relationship between the federal government and Indians as contemplated by Section 91 (24). In that case the Court was reluctant to characterize the relationship as a "trust relationship," as a wide-ranging relationship that dictates broad responsibilities for the federal government. The Court chose instead to apply the narrower concept of fiduciary obligations. The federal government has been ambivalent in its view of the relationship as a trust, but it has not been able to deny that it is a very special relationship.

In 1876, Parliament passed the *Indian Act*, the legislation that consolidated all existing laws concerning Indian peoples in the provinces and territories. This Act and its subsequent amendments provided Canada with the means to "manage" Indian affairs, to recognize and assimilate Indian peoples and their governments

(Mathias). In line with this goal, the *Indian Advancement Act* of 1884 outlined ways for the "more advanced bands of Indians of Canada" to elect chiefs "with a view to training them for the exercise of municipal powers" (Daugherty & Madill). The latter goal is, of course, a familiar one currently—at least for the federal and provincial governments. For the most part, Indian governments remain as sceptical of it in the present day as they were over a century ago.

The contradiction between the federal government's goals of providing a protective framework for the exercise of the Indian way of life and, at the same time, imposing uncustomary and alien forms of government on Indian peoples continued throughout the last part of the nineteenth century and the early twentieth century. Recognition and assimilation became a continuing dilemma, pervading every aspect of the relationship between Canada and the Indian peoples within it.

## A Troubled Relationship

Throughout the late nineteenth and the early twentieth centuries the federal government gradually "gave" Indian people more authority to control their local affairs. The process was a troubled one in many ways. Many tribal groups persisted in asserting their inherent authority to govern themselves, but, with varying degrees of concordance, they also accepted the new powers. While the scope of the elective principle and the powers of band government were gradually expanded, ultimate governing authority, the Crown always made clear, lay with the Crown and its representative, the department of the federal government that had specific responsibility for Indian affairs. It was the Crown, the department, and the Indian Agent that decided which kinds of governing and political activities were permissible and which were not. In 1927, for example, a ban was placed on some types of political organizing by Indians. The potlatch, a central governing institution of Indians in coastal and northern British Columbia, was also outlawed for many years.

Between the two world wars, the evolution of band government continued at an uneven rate, with frequent conflicts over the question of jurisdiction, that is, over who had the real power and authority, and the nature of governing institutions (Taylor, 1984a). Finally, in 1946, Parliament established a Special Joint Committee to examine and consider the *Indian Act*. On June 20, 1951, a new *Indian Act* became law. The 1951 revisions of the *Indian Act* removed many of the restrictions of the old Act, but, as George Manual and Michael Poslums have noted, it was full of ambiguities which made Indian government at best a complicated and, at worst, a frustrating endeavour. In 1958, registered Indians were given the right to vote in federal elections.

Throughout the 1950s and 1960s, the circumstances of Indian people became more and more visible to other Canadians. This visibility was reinforced by efforts such as the landmark report by H. B. Hawthorn, *A Survey of the Contemporary Indians of Canada*. Slowly, but surely, Indian peoples themselves began to exert a significant degree of control over their own governments at the band level and to exert consistent pressure on the federal government at the national level. Continuing a trend toward devolution that had accelerated starting in 1945 with the transfer of medical services from Indian Affairs to the Department of National Health and Welfare, Indian Affairs also began to adopt policies such as the one aimed at integrating Indian children into provincial school systems. At almost each step, as it worked to expand the powers of bands and the range of programs available to Indians, the federal government sought to include the provinces, to "normalize" the presence of Indian people and their governments within existing federal and provincial arrangements. The process of assimilation was accelerating.

Devolution — the transfer of Indian Affairs programs to bands, the provinces, and other federal agencies — has been a consistent feature of the federal approach to the government of Indian peoples since the end of the Second World War. This trend has been accompanied by another one which has emphasized more "self-government" and "community self-determination." In the mid-sixties, Indian Affairs introduced a "community development" program aimed at augmenting the participation of Indian people in civic affairs on reserve. This program generated significant activity on many reserves, as workers encouraged people to become active citizens in local government matters. Ultimately, the program was discarded, as it often reinforced reserve-based dissent to many other Indian Affairs initiatives, including devolution.

During the 1960s and 1970s the drive for Indian self-government began to develop into a movement, into a concerted and self-reinforcing effort to carve a place for Indian governments in a revamped federal-provincial system. The federal government has responded to this movement in contradictory ways. It has sought to facilitate the process of self-government while it has consistently followed policies that have either ignored the special nature of

Canadian-Indian relations or have been based on a goal of terminating any form of special relationship. The duality of recognition and assimilation has continued.

As history indicates, a policy of terminating any special status for Indian peoples or governments is not unique to recent times (Union of British Columbia Indian Chiefs, 1980). The theme of termination characterized the recommendations of the Bagot Commission in 1844, for example, when Governor General Sir Charles Bagot recommended that the government's guiding principle should be to treat Indian people the same way it treated others. In 1969, the Trudeau government issued a statement on Indian policy which echoed similar themes (INAC, 1969). The statement was presented to the first session of the Twenty-eighth Parliament by the Honourable Jean Chretien, then Minister of Indian Affairs and Northern Development, and came to be known as the *White Paper*. A few passages convey its meaning and implications:

> ... the separate legal status of Indians and the policies which have flowed from it have kept the Indian people apart from and behind the Canadians. The Indian people have not been full citizens of the communities and provinces in which they live and have not enjoyed the equality and benefits that such participation offers.
>
> ... the road of different status ... has led to a blind alley of deprivation and frustration....
>
> ... the Government ... will offer another road for Indians.... Indian people must be persuaded, must persuade themselves, that this path will lead them to a fuller and richer life.

Throughout the 1960s, Indian Affairs had followed a policy of encouraging provinces to provide more services to Indian people and of encouraging Indian people to become directly involved in the day-to-day administration of these and other services (Weaver, 1981). With the Chretien *White Paper*, it became clear that this process of devolution and community development had become a policy of termination (Cardinal, 1969). This was what the *White Paper* meant to Indian people.

The response to the *White Paper* on the part of Indian peoples was quick and, surprisingly, unanticipated by the Trudeau government. Philip Paul of the Tsartlip Band in Saanich, British Columbia and a key national Indian leader, branded the statement as, "flowery words, a distortion of the Indian's needs" (Weaver, 1981). The Six Nations Iroquois Confederacy declared their reserve to be "a sovereign state" that would "not be governed by the Ontario or Federal Governments." Harold Cardinal, President of the Indian

Association of Alberta, said that the statement meant "that Indians can line up for their welfare cheques along with the rest of the poor people of the country" (Weaver, 1981).

Cardinal expanded on his criticism of the *White Paper* in his book, *The Unjust Society: The Tragedy of Canada's Indians*. He posed his alternative in an interesting way. Against "the ignorance and bigotry" of Canadian society, he suggested that, "Canada's Indians look to the future as the greatest period for participation. Our contribution will be based upon what we are as a people, upon what as a culture Indian society will add to the mosaic, and upon what we can accomplish as individuals." While pointing to the need for economic and political power at the community level, Cardinal's argument focused on cultural and personal responses to the process of assimilation and termination.

Cardinal's was a leading voice in the opposition to the *White Paper*. His ideas foreshadowed many of those that would become more prevalent throughout the 1970s. His emphasis on culture mirrored a reinforced personal and social consciousness among Indian peoples that would gradually become incorporated as a key aspect of the emerging organizational culture of many Indian governments, as these governments evolved at the community level throughout the 1970s and 1980s.

Other aspects of Cardinal's arguments have not continued as dominant themes in the movement towards self-government. The portion of Cardinal's analysis that relied on an interpretation of Indian-Canadian relations as a by-product of race relations, for example, to a striking extent, has been superseded by an emphasis, particularly on the part of Indian government leaders, on political and administrative responses to federal policies. Such responses may be contrasted to ones based upon a racial analysis of the Canadian mosaic. The accent increasingly has been on government as a manifestation of and a protective measure for culture, rather than culture as a reflection of racial differences and discord.

## The Emergence of the Recent Movement for Self-Government

The Trudeau government eventually backed away from the *White Paper* policy as the formal statement of its approach to the administration of Indian affairs. Since 1969, many Indian leaders and governments have continued to maintain that the policy of termination, the ultimate act of assimilation, has dominated the federal approach (see for example, Union of British Columbia Indian

Chiefs, 1987). Increasingly, the assertion of and drive to self-government has been put forward in this context. Self-government has been asserted as a fact to be recognized, not as a path to assimilation. Self-government has been defined by Indian peoples and their governments as a way of protecting the special status of Indian peoples in Canada and of affirming the independent nature of their governing authority. Self-government has come to mean "doing it the Indian way" and this has led to many practical efforts by Indians to press Canadian federalism to expand its bounds in order to accommodate another reality, a third force, a third order of government.

One of the earliest manifestations of the renewed sense of Indian self-government was the National Indian Brotherhood (NIB) policy paper on *Indian Control of Indian Education*. "The Federal Government has legal responsibility for Indian education as defined by the treaties and the *Indian Act*," the NIB maintained. On the basis of this assertion, the Brotherhood concluded that "any transfer of jurisdiction for Indian education can only be from the Federal Government to Indian Bands." It further asserted that, "Band Councils should be given total or partial authority for education on reserves, depending on local circumstances, and always with provisions for eventual complete autonomy, analogous to that of a provincial school board *vis à vis* a provincial department of education."

In the mid-1970s, *Indian Control of Indian Education* was a very influential document in Indian communities across the country. By placing an emphasis on the question of jurisdiction and control at the local level, it made education a key issue, as the drive for self-government emerged as a priority in many Indian localities. The paper was not without its faults. Its reasoning with regard to jurisdiction and the authority to govern was somewhat contradictory. While calling for full control over and the possibility of complete autonomy in relation to education, the Brotherhood asserted that jurisdiction lies with the federal government. It also equated "complete autonomy" with a condition "analogous to that of a provincial school board."

By the early 1980s, the position of Indians was becoming increasingly clear: their governments are First Nation governments and the authority of those governments is based upon inherent and independent jurisdiction. Nevertheless, the NIB's identification in the 1970s of jurisdiction as a critical issue was insightful. Jurisdiction on the part of governments represents the authority to control. If jurisdiction lies elsewhere, then control eventually lies elsewhere. Indian governments have increasingly experienced this fact as they have sought to gather more control at the community level. This is one of the key reasons why the matter of jurisdiction became a central one in the 1980s.

It is sometimes thought that the *White Paper* spawned much of the Indian activity in the 1970s in relation to the standing of Indian governments and status of aboriginal rights in Confederation. The paper was so provocative, the theory goes, that it set off Indian bands, tribal councils, and provincial as well as national associations in a burst of self-defining energy across the country. There is some truth to this argument, but the growth and direction of the current movement for Indian self-government had roots that predated the *White Paper*.

Indian peoples have asserted their right to self-government since contact with Europeans. This assertion has taken many forms: overt protest, refusals to cooperate, continuance of traditional patterns, and other projections of political authority and cultural distinctness. Furthermore, the movement for self-government, well in advance of the issuance of the *White Paper*, took a new form with the drive for Band self-government at the community level during the 1960s.

One of the first bands in Canada to take the lead in this direction was the Walpole Island Band of southern Ontario (Taylor, 1984b). The specific issue that ignited the movement for self-government at Walpole Island was the powers of the Indian Agent as the representative of Indian Affairs. Indian Agents, particularly as a result of a 1936 amendment to the *Indian Act*, had very broad powers in Indian communities. They were empowered to preside at and adjourn as well as record the proceedings of all Band Council meetings. They were also given the responsibility of reporting and certifying, subject to the ultimate approval of the Minister, all Council bylaws and proceedings.

Since the early 1950s, the people of Walpole Island had taken an increasingly active interest in the affairs of their community. By 1964 they could no longer tolerate the powers and limitations of the Indian Agent system, and demanded that the Indian Agent be removed. With the assistance of the band manager who had been appointed the year before (the first such position in Canada), the Walpole Island Band began to assert much greater autonomy. As Chief Burton Jacobs later noted, in the following five years great progress was made by the community: "We started and completed development programs that cost well in excess of $2.75 million"

(Van Wyck). In the 1970s and 1980s, the band used its new powers to enhance economic development, particularly through the use of its natural resources.

Throughout the late 1960s and the 1970s, most bands across Canada followed the lead of Walpole Island and began to exercise more administrative and political power under the *Indian Act* and in relation to non-*Indian-Act* federal and provincial programs. Many bands, particularly ones with populations of less than one thousand, began to turn toward the tribal council concept as a way of obtaining economies of scale, needed advisory services, and leverage in dealing with Indian Affairs as well as other federal and provincial bureaucracies. It was in Manitoba, perhaps more than in any other province, that tribal councils developed along these lines. Starting in the late 1960s and building into the 1970s, a "Partnership Concept," between Indian Affairs and Indian governments in that province began to evolve (Indians and Inuit Affairs Program, Manitoba Region).

Initial efforts to develop this concept were directed at encouraging Indian Affairs and Indian governments "to jointly develop operational structures to facilitate the transitional process towards obtaining Indian Government control." The eight Departmental Indian Agent positions in the province were phased out and, over time, other Indian Affairs administrative mechanisms were also discontinued as tribal councils, such as the Dakota Ojibway and the Swampy Cree Tribal Councils, began to assume responsibility for providing services to the bands. (Indian and Inuit Affairs Program, Manitoba Region).

The Dakota Ojibway Tribal Council, for example, was incorporated and recognized by the Government of Manitoba in 1974. The Swampy Cree Tribal Council followed the same road in 1975; the Interlake Reserves in 1977; the Southeast Resource Development Council in 1978; the West Region and the Keewatin in 1979; and the Island Lake in 1981. In 1974-75, the Dakota Ojibway and Swampy Cree received approximately $127,100 in funding from Indian Affairs. In 1975-76, these two councils received approximately $381,200. By 1982-83, they received well over $12 million for education and economic development programs, social services, community infrastructure and services, and band government services. More and more, they began also to enter into administrative arrangements with the Manitoba provincial government over matters such as policing and child welfare services.

In other provinces similar developments took place over this period. Bands, tribal councils, and other Indian governmental entities grew at a considerable pace. Efforts were made to assimilate these governments as agents of the federal and provincial governments, but Indian governments increasingly sought recognition, not assimilation. Indian government as an organizational reality had become an emerging force as Indian governments began to deliver more services to their citizens. Indian governments had begun once again to occupy many of the jurisdictional areas within which they had traditionally operated. The meaning of Indian government in practice began to be clear, but it was not clear that the federal and provincial governments were listening to what Indian peoples and their governments had to say.

## Aboriginal Rights, Treaty Rights, and Self-Government

The drive toward greater Indian self-government has not only taken place within the context of band or tribal council operations. It has also emerged in the context of relations established by existing treaties and the land claims movement (Brown & Maguire; Cassidy & Dale). Treaty and land claims issues revolve around the notion of aboriginal rights, rights which are now recognized, if not defined, in the Constitution. These issues have come to be increasingly tied up with the question of Indian government and its relationship to Canada's constitutional order.

Much of the Canadian land mass south of 60 degrees latitude was the subject of a treaty process that extended into the early twentieth century. The results of this treaty process have strongly affected the rights of many status Indians today. A status Indian is a person registered or entitled to be registered as an Indian according to the criteria established in the *Indian Act*. Approximately one-half of Canada's status Indians are "treaty Indians" who belong to a nation of Indians who were the signatories to a treaty. England, France, and then Canada engaged in treaty making for several reasons. At first, the aim was to establish exclusive trading relations. Then the objective was to secure the assistance or neutrality of Indian nations in warfare between the European powers. Eventually, treaties were used as a device for enabling settlement and resource development by non-Indians and to extinguish the land claims of Indian peoples. The last of the original treaties was signed in 1923. The principal areas not covered were most of British Columbia, Yukon, the Northwest Territories, Labrador, and northern Quebec.

The Indian nations that are affected by the treaties see them in many ways. They take the treaties to be "agreements" that were imposed; "agreements" that they were often pressured into and deceived about. They also see them as "a collection of mutual guarantees, a political and social compact and a protocol for dealing between nations" (First Ministers' Conference, 1987a). They see them as a recognition of their aboriginal rights as well as of the authoritative power of their governments to represent them and make important decisions on a nation-to-nation basis. As the Prairie Treaty Nations Alliance maintains:

> The Treaties entered into between the Crown and the Indian Nations have and will continue to establish the basic framework upon which the bulwark of the political relationship between the Crown and the Indian Nations will occur.... The Creator has given us the right to govern ourselves and the right to self-determination. The rights and responsibilities given to us by the Creator cannot be altered or taken away by other nations.

In Manitoba, Saskatchewan, and Alberta, as elsewhere, the resurgence of the treaty nations in the 1970s and 1980s was tied to the emergence of stronger band and tribal council governments.

Recent comprehensive claims settlements, settlements involving previously unextinguished aboriginal rights, also may be seen as treaties. The first of these occurred in Quebec. It is important to note, however, that the Quebec agreements were not the result of the federal government policy. They were essentially out-of-court settlements. The federal government was not an essential party until the very last part of the negotiations, which took place mostly with Quebec.

The announcement in 1971 of the intention to develop the hydroelectric potential of James Bay moved the Inuit and the James Bay Cree of northern Quebec and the Naskapi of northeastern Quebec to successfully pressure that province and Ottawa for a settlement of their comprehensive claim. In exchange for guaranteed rights and a compensation package under Canadian law, the affected Cree, Inuit, and Naskapi peoples agreed to the extinguishment of their aboriginal rights. In the first of what have been called the modern treaties, the basis was laid for an expanded if contested exercise of Indian government.

In 1973 the federal government established the Office of Native Claims and agreed to consider comprehensive claims as well as outstanding grievances of a more specific nature. To date, a comprehensive claims agreement has been reached in the western Arctic, and agreements in principle have been achieved in Yukon, the Northwest Territories, and the eastern Arctic. Over twenty additional "comprehensive claims" have been filed with the Office.

Close to three hundred other "specific claims" have also been put forward, these claims arising from perceived breaches of obligations in treaties and problems in the administration of the *Indian Act*, particularly with regard to the handling of Indian property and reserve lands (Ruben).

As the authors of the *Indian and Native Programs Study Report* to the Nielson Task Force on Program Review noted in 1985, the comprehensive claims movement, as it emerged in the 1970s and 1980s:

> ...established a broad set of issues.... While compensation for land surrendered for development was an important issue, the native people were also concerned with the preservation of their traditional lifestyle, the advancement of self-government, and their participation in the economic benefits of Canadian society.

Land claims helped to bring attention to an additional facet of the quest for self-government: the effort to control the management and development of the land and natural resources within currently recognized and traditionally owned Indian territories.

For many Indian peoples in Canada the land and the self-government questions cannot be detached. The land question is, at its roots, a question of the authority and jurisdiction of self-government. In 1987, the hereditary chiefs of the Gitksan-Wet'su-wet'en peoples brought their claim to a large portion of northern British Columbia to the courts on this basis (Gitksan-Wet'suwet'en Tribal Council). This particular claim has and will continue to have enormous influence on Indian peoples and their governments, as it and other outstanding claims have increasingly revolved around issues of governance (Cassidy, 1988e).

The resurgence of the treaty nations, the land claims movement, the growth of Indian government at the community level, and the increasing interaction of Indian governments with a variety of federal and provincial government agencies and departments all combined to make the status of Canada's aboriginal peoples a major issue as the Constitutional process unfolded in the late 1970s and early 1980s (Hawkes; Zlotkin, 1983).

## First Nations Government: A Constitutional Issue

At first, other issues such as Quebec, the West, and amending procedures dominated discussions about the constitution. "Yet despite all this," as Roger Gibbins has noted, "Indians emerged in the end with very significant gains. Indeed, the 1982 *Constitutional Act* has more to say about aboriginal issues than it has to say about Quebec, intergovernmental relations or Western alienation" (Ponting). Sections 25, 35, and 37 of the *Constitution Act, 1982* recognized and affirmed existing aboriginal and treaty rights and mandated the holding of a constitutional conference composed of the Prime Minister and the First Ministers of the provinces to define the actual rights protected by the Constitution. This conference was held in March, 1983, and, in its aftermath, such meetings were continued over a four-year period, ending in 1987. The aboriginal right to self-government was not originally perceived to be the major topic that would be debated at these First Ministers conferences, but it became the key issue.

It was in this context that the Thirty-second Parliament empowered a special committee, under the direction of Liberal M.P. Keith Penner, to examine, report upon, and make recommendations concerning the "status, development and responsibilities of band governments on Indian reserves, as well as the financial relationships between the Government of Canada and Indian bands." The Penner Committee made its principal report in October 1983. It had a major impact on the constitutional debate (Gibbins and Ponting, 1984; Tennant, Weaver, 1984). During the course of its research, the committee heard a total of 567 witnesses, during 215 oral presentations and 60 public meetings. It travelled to all regions of Canada, holding many meetings on reserves, in native friendship centres, and in other community settings. It also commissioned research on financial matters, the trust relationship, relations between aboriginal peoples and governments in other parts of the world, and the economic foundations of government.

The *Penner Report* presented the basis for a significant departure from current federal policies regarding Indian governments. The *Indian Act* and much of the work of Indian Affairs for more than a century had been based on the idea that traditional Indian government is primitive and outmoded, or practically nonexistent. "Contrary to this view," the Penner Committee argued, "most First Nations have complex forms of government that go far back into history, and have evolved over time."

Penner used the phrase "First Nations" very carefully, associating it with the uses of the term by Europeans in their early attempts to colonize North America. As used by Indians, the Report explained, the term "nation" does not have "separatist connotations. Rather it means a group of people with a common language, culture and history, who identify with each other as belonging to a common political entity." The *Penner Report* pointed to the obstacles to self-government, including the complex federal and provincial governmental structures through which Indian people have to work, and the *Indian Act*. It also accented "three areas of critical concern" in Indian communities: education, child welfare, and health care. In each of these areas, the authors of the report noted, the Indian peoples who had appeared before the committee had pointed to "the destructive nature of external control and their wish to exercise recognized and effective jurisdiction."

Among the recommendations contained in the *Penner Report*, the following stand out as the most significant:

- that the right of Indian peoples to self-government be explicitly recognized, stated and entrenched in the Constitution of Canada;
- that the federal government pursue constitutional entrenchment of self-government as soon as possible, but in the meantime, introduce and implement an *Indian First Nations Recognition Act* and other legislation that would lead immediately to the maximum possible degree of self-government;
- that Indian governments be recognized as First Nations forming a distinct order of government, with their jurisdiction clearly defined, and their members acting legitimately as the representatives of their peoples in their relationships with Canada;
- that Indian First Nations have the rightful jurisdiction to each determine their own membership as well as full legislative and policy-making powers within the boundaries of Indian lands;
- that a Ministry of State for Indian First Nations, linked to the Privy Council Office, be established to manage and coordinate the federal government's relations with Indian First Nation governments, and the Department of Indian Affairs and Northern Development be phased out within five years;
- that a specialized tribunal be established to decide disputes in relation to agreements between Indian First Nations and other governments;
- that Federal Government funding of First Nations Governments be by direct grant, as nonlimiting as possible, and at rates set by mutual agreements between Indian and the federal governments;
- that a new federal land claims policy, not based on the doctrine of extinguishing aboriginal rights, be established to promote the fair and just resolution of outstanding land claims, on the basis of a recognition of these rights.

The *Penner Report* was greeted by many as a "remarkable and significant document," of "seminal importance for the future of Indian affairs in Canada." (Weaver, 1984; Gibbons) In many ways, the *Penner Report* was a significant step forward for the proponents of Indian self-government. It strongly linked the aboriginal rights and self-government questions. Its proposals concerning constitutional entrenchment of the right to self-government, jurisdiction, financing, land claims, and the settlement of intergovernmental disputes, as well as the vocabulary it employed, all were seen as meeting many of the needs and aspirations of emerging Indian governments on the community level. The Special Committee's proposals indicated a clear preference for moving away from a municipal model of Indian governments, whereby these governments would exist and act on the basis of the legislative fiat of Parliament and under the jurisdiction of provincial governments as well. This was also well greeted by Indian peoples.

Despite its strengths, the report was not without its faults (Tennant; Weaver, 1984). Essentially, the report equated Indian government with band government, although it did make reference to other governing entities. For many Indian governments in Canada this is a practical equation. For others, it is not. For the Six Nations of Ontario, the Mohawks of Kahnawake, and the Northwest Coast nations, such as the Gitksan and Wet'suwet'en, for example, the idea of band council government is an imposed one. These peoples argue that traditional Indian political institutions such as clans and the potlatch or feast are a more legitimate basis for Indian government. Ironically, the *Penner Report* was silent on this matter. While it accepted the ideal of nationhood and inherent jurisdiction and recognized the traditional basis of self-government, it ignored in a significant way the indigenous political institutions that are fundamental to the exercise of inherent jurisdiction on the part of Indian governments.

The report had other problems as well. As Paul Tennant pointed out, by accepting the band as the basis for Indian government and allowing bands to determine their own membership, the *Penner Report* was, in effect, "allowing those now legally defined as Indians to decide whether those not defined should be accepted as additional members. In effect, the Committee was recommending continuing to bar many, if not most, nonstatus and nontreaty Indians from their rights as Indians." In fact, the biggest weakness of the report was its failure to address many of the implications or problems of Indian self-government in practice. As a result, keen observers of Indian government such as Roger Gibbins and J. Rick Ponting (1984) could argue that the Penner recommendations, "in fact threaten to sever the ties between Indian nations and the Canadian political community."

Asserting that, "the Committee rejects federalism as a means of structuring the political relationship between Indians and the Government of Canada," Gibbins and Ponting (1984) maintained that Indians falling under the jurisdiction of First Nation governments "would virtually cease to be Canadian citizens in any practical sense of the word." Given a proper understanding of federalism, this is not a legitimate characterization of the implications of the Penner recommendations, but the generality of those recommendations and their relative silence on the practical dynamics of Indian self-government provided a context in which such contentions could be legitimately made and entertained.

The federal government responded to the *Penner Report* in March 1984. Although it did not adopt or indicate an intention to adopt many of Penner's recommendations, the federal government characterized its response as, "in a substantial way," in the "terms and spirit of the Special Committee's recommendations." It noted that the suggested constitutional changes were "under active discussion," but it did not firmly and clearly pledge itself to or give its support for explicit recognition of First Nations governments as a distinct order of government with broad and relatively independent jurisdictional powers, as recommended in the report. Depending on one's perspective, it neatly or crudely sidestepped this matter. It did indicate, however, its intention to introduce in Parliament legislation "to establish a framework for those Indian First Nations that wish to govern themselves and their lands in a way that is not possible under the *Indian Act*." The legislation that it subsequently introduced was pending when an election was called. It died as a new Conservative government was elected.

During the 1980s, as a result of the constitutional process, the claims of treaty and nontreaty Indians, the *Penner Report*, and most importantly, the growing activities of Indian governments, the matter of the aboriginal right to self-government had become a constitutional issue, a question of national importance. Nevertheless, recognition of this right by the federal and provincial governments did not follow. These governments continued to question the meaning of Indian government in practice, but they also found that Indian government was an issue and a reality they could not ignore.

## The Federal Government's Search for a Self-Government Policy

The federal policy toward Indian self-government as it has emerged in the postwar period has been at best a confused and contradictory one. Sometimes, as in one of its submissions to the Penner Committee, the federal government has advocated that Indian governments should be seen as essentially municipal governments operating within a not greatly revised federal framework. At other times, as in the 1969 *White Paper*, it has called for Indian bands to take a place as part of the provincial framework of government. More recently, with the special legislation that it developed with the Sechelt Band of British Columbia, it has indicated a preference for a hybrid model of federally and provincially empowered municipal-type government at the band level. Quite apart from these stances, it has also acted to foster more self-government under the *Indian Act* and Indian and Northern Affairs Canada (INAC), functionally defining self-government in practice as the administration of devolved programs and powers. In its response to the *Penner Report*, INAC even accepted the idea of self-government as First Nations government, implying, if not actually suggesting, that Indian governments might enjoy a distinct order of jurisdiction to some degree.

These various and somewhat contradictory stands on the matter of self-government continued to characterize the federal position in the mid-1980s as the Conservative government of Brian Mulroney took office (Hall). As the new government's Nielson Task Force on Indian and Native Programs noted: "The existing framework of federal policy in native affairs is inconsistent, unco-ordinated and, in too many cases, rooted in anachronisms in the *Indian Act*." Just as it had in the nineteenth century, the Government of Canada persisted in following a policy that shifted from assimilation to recognition and then back to assimilation. The Conservative Government, particularly under the leadership of David Crombie as INAC Minister, provided some early indications that it might be open to efforts to change the nature of the federal stance. It even indicated it would like to develop a pragmatic approach to self-government based upon the wishes and aspirations of Indian people in Indian communities (INAC, April 15, 1986).

One strand of the Conservative government's policy regarding Indian government could be found in the April 1985 report of the Nielson Task Force. The tone and substance of the *Nielson Report* was radically different from that of the *Penner Report*. The Penner Committee had called for mutually agreed upon levels of funding for Indian governments; the Nielson group noted the need for "capping expenditures and turning the responsibility back on native communities to resolve their problems for themselves." The Penner Committee had argued for an approach based upon the recognition of Indian governments as First Nations governments with wide powers. The Nielson Task Force Group assumed that the "recognition of Indian bands as sovereign entities is not contemplated," and called for a "Management Approach to Native Program Reform," based upon "Memoranda of Understanding defining comprehensive agreements between Canada and each of its provinces and territories" concerning decentralized program delivery.

For Nielson, political and constitutional questions had become administration and service delivery matters. In this context, the involvement of Indian peoples in determining the overall framework for a new federal-provincial approach was not addressed: clearly Indian government was a matter of day-to-day administration and bureaucratically driven agreements concerning service levels and the exercise of delegated powers, and not of political consultation and compromise at a constitutional level, as a preface to a revised federalism.

Other major differences existed between the Penner and Nielson reports. Penner had called for a resolution of outstanding comprehensive land claims and a linkage of the land question with self-government issues. Nielson concluded that, "the settlement of specific claims should be accelerated, and negotiation of comprehensive claims deferred until the government's position on native self-government is determined and implementation is well under way." The *Nielson Report* recommended that the land and self-government issues be detached to a consequential extent and that the constitutional status of self-government remain unaddressed.

The report of the Nielson study team on Indian and native programs was, as indicated in its introduction, "released prematurely without the fore-knowledge or the sanction of the government." In the face of widespread shock and dissatisfaction with the report in Indian communities, Prime Minister Mulroney had to provide several public assurances that the government's declared openness to issues of aboriginal rights, particularly as they related to self-government and the Constitution, was still the order of the day.

This position was somewhat reinforced by the December 1985 publication of *Living Treaties: Lasting Agreements*, the report of the Federal Task Force to Review Comprehensive Claims Policy, better known as the *Coolican Report*, after the chairman of the task force, Murray Coolican. It is important to note that, although the Conservative government commissioned this report, it was not a statement of public policy. In fact, many of the ideas in the report were fundamentally at odds with the government's actual policies and practices, these being mirrored much more accurately in the *Nielson Report*.

Coolican strongly suggested that the federal government's positions on and activities in relation to self-government could not be detached from matters relating to land claims or aboriginal rights. If Nielson had tilted toward assimilation, Coolican urged the federal government to turn toward recognition. Coolican argued that:

> To deal adequately with land, agreements must address the question of the right to determine what happens on that land. Land and the jurisdiction over it are bound up inseparably with the preservation of aboriginal societies . . . whose economies, religions, political systems, education systems, and family relations are established by reference to their traditional lands. . . . In practical terms, the separation of land rights negotiations from negotiations or discussions on self-government would be far more costly than an integrated approach and would give rise to a myriad of strategic and planning problems.

The message of the *Coolican Report* regarding self-government was certainly different from that of the *Nielson Report*. Neither report formally represented government policy, but the contradictions in federal Indian policy, at least at the level of public expression, were as strong as ever. Nielson had argued for the assimilation of Indian governments into the existing federal-provincial framework on the basis of agreements focused on specific service delivery areas. Coolican had tied self-government to the resolution of treaty matters, that is, matters touching upon the constitutional order.

The confusion about the Mulroney government's policy toward self-government was reinforced by many of the actions and expressions of intention of its first INAC Minister, David Crombie. "Self-government," Crombie proclaimed in a 1986 policy statement "is a major theme and priority of my department" (INAC, 1986, April 15). Associating the stance of his Department with the general sense of the *Penner Report*, Crombie argued for an approach that emphasized collaboration and consultation with Indian governments as well as community-based negotiations and initiatives. New INAC programs based on this approach emphasized the theme that Indian people would determine the pace at which fuller self-government would emerge.

Despite such intentions, INAC self-government programs, as initially developed under Crombie, were somewhat similar to the approach that had marked earlier efforts such as the *Indian Advancement Act* of 1884. Ultimately, Indian Affairs would determine when "properly developed" Indian communities were "ready" for more self-government and a more "advanced" place within the existing federal-provincial framework. INAC would also determine the limits within which self-government would evolve. This was not the Penner approach, nor was it an approach that most Indian governments would accept as an alternative to constitutional change.

INAC's "Community Initiatives" thrust purported to represent a "two-track" approach to the question of self-government. At the constitutional level, the principles of self-government and the question of inherent jurisdiction would be addressed. At another level, Indian self-government in a day-to-day manner would be addressed through "a concurrent process of community-based negotiations." When Crombie left INAC, the new minister, Bill McKnight, continued this approach, suggesting that some communities might be ready to move beyond the bounds of the *Indian Act* into one form or another of new federal legislation. As Crombie and McKnight's Department maintained in its formal literature on the matter:

> ...community-based negotiations would achieve practical benefits for individual communities.... Communities are themselves in the best position to determine the direction and pace of their progress toward self-government.... The ... process ... might be considered as a transitional phase from the existing legal framework towards a fuller exercise of Indian self-government (INAC, April 15, 1986).

By the end of the 1980s many Indian bands and tribal councils had expressed some interest in funding under the INAC community negotiations program. Almost all who did so saw such funding as a pragmatic measure to help in the short-run. Very few saw special federal legislation or other arrangements under the existing constitutional order as adequate bases for the exercise of the kind of self-government they wanted.

While agreeing with the view that self-government would take different forms across the country, many Indian governments questioned whether the specific, day-to-day aspects of Indian government were being addressed by INAC as a way of avoiding questions of principle. They questioned the dichotomy of practice and principle and wondered if the "two-track" approach was not a journey along the same old track of delegated powers and controlled administration. They wondered if the federal government's approach was not assimilation clothed as recognition. For many Indian peoples, the new Indian Affairs self-government approach was not self-government in practice. It was *Indian Act* government, Indian government by external governments, even though it might assume different appearances and operate under new legislation. The Sechelt legislation of 1986 was interpreted by many observers in this light.

The *Sechelt Indian Band Government Act* represented the culmination of fifteen years of negotiation and consultation. It was offered by the federal government as an individualized piece of legislation designed to meet the self-government aspirations of the Sechelt people of southwestern British Columbia. It was fully accepted by the Sechelt people in this spirit. The major purpose of the Act is to grant federal government authority to the Sechelt Band to exercise delegated powers and negotiate agreements about specific issues, such as taxation for local purposes and the control of band land. The Act also provides the band with the capability of negotiating arrangements with the British Columbia government for recognized governing authority in that province. At the same time that the Sechelt Band negotiated the legislation with the federal government, it also negotiated a new financial arrangement for band funding.

The Sechelt legislation is often seen as a unique effort by the Government of Canada to establish Indian self-government apart from the constitutional amending process or the *Indian Act*. In actuality, there was another, earlier, piece of legislation, the 1984 *Cree-Naskapi (of Quebec) Act*, which allowed eight James Bay Cree bands and the Naskapi community of Schefferville to function as governing entities without Indian Affairs intervention. By virtue of the fact that the *Cree-Naskapi Act* is tied to self-governing rights created by a land claims agreement that is protected by Sections 25 and 35 of the Canadian Constitution, many believe it to be a much stronger piece of legislation than the *Sechelt Act*. Cree-Naskapi Bands have had several differences with the federal government on matters relating to funding, however. They have not found implementation to be an easy matter. (The two Acts will be discussed in greater detail in Chapter 7.)

The ambiguities relating to the implementation of the *Cree-Naskapi Act* and the continuing criticisms about the constitutional status of the *Sechelt Act* have perpetuated real hesitancies among Indian peoples about the development of regional and band-specific legislation founded on "community-based initiatives." Many Indian leaders have continued to be afraid that the federal government ultimately equates Indian government with municipal government under federal and provincial powers—and this they will not accept. They continue to seek recognition for their inherent right to self-government.

### Indian Government: A Multifaceted Reality

The extension of Indian self-government by band or regionally specific legislation is one of several federal approaches to Indian government pursued in the 1980s. Another was the amendment of specific sections of the *Indian Act*. With the passage into law of Bill C-31 in June 1985, the *Indian Act* was amended in several ways. As discussed in Chapter 3, some of the changes were intended to eliminate gender discrimination in the Act, to return Indian status and membership to those who had improperly lost these designations. The legislation also gave bands the power to formulate and administer their own membership codes. Other changes increased band powers in relation to specific matters such as control of residency on reserves. Generally, these changes were greeted in a positive manner by Indian governments, although many of these governments expressed concerns about their ability to provide services to the new members who would join bands as a result, if resources were not expanded to match the growth in population.

In 1988, the *Indian Act* was again amended to provide bands with more financial powers. The amendments were intended to strengthen the power of band councils to levy property taxes and control development on reserve land. "This bill is the result of the first major Indian-led initiative to amend the *Indian Act*," INAC Minister McKnight noted, "It ensures further progress towards Indian political and economic self-reliance." Chief Clarence Jules of the Kamloops Band in British Columbia promoted the initiative and gained the support of over 115 band councils as he did so.

The advantages and disadvantages of specific amendments to the *Indian Act* apart, the further revision of the Act is not generally seen as a major strategy for achieving greater self-government on the part of Indian peoples. Almost all interests agree that the Act is fundamentally flawed and beyond saving. It is not based upon the recognition of Indian government. It is based upon its denial in all but the most limited of ways.

While most Indian governments hold that the recognition of a wide range of aboriginal rights in the Constitution is the most appropriate and the only sure path to full self-government, in practice Indian peoples and their governments also have pursued a diverse range of strategies to attain greater self-government. Frequently, these strategies have been employed interchangeably as circumstances and opportunities have allowed. Thus bands have sought greater autonomy of decision-making over Indian Affairs programs at the local level, especially in relation to governing functions such as education, housing, and community infrastructure. The Alexander band in Alberta, the Kispiox and Mount Currie Bands in British Columbia, the Dakota Ojibway Tribal Council in Manitoba, and the Kahnawake Band in Quebec, for instance, are just a few—if some of the most outstanding—examples of Indian governments that have taken much greater control of INAC-funded education activities.

Where programs are funded and administered by other federal departments, such as the community health services provided by National Health and Welfare Canada, bands and tribal councils have taken similar initiatives. They have also done so in relation to many provincially provided services and programs. Child welfare has been a particular focus for this kind of strategy, as tribal councils, such as the Dakota Ojibway and the Nuu-chah-nulth of British Columbia, and bands such as the Stoney Creek and Spallumcheen in British Columbia, have taken over these programs.

When the process of gaining more control over existing federal or provincial programs has been difficult, Indian governments have used other powers under the *Indian Act*. There has been a creative use of Sections 81 and 83 of the Act by many band councils to develop bylaws in relation to policing, fishing, and gaming activities, for example. While the powers of band councils are severely limited under these and other sections of the *Indian Act*, there have been instances where the courts have upheld band bylaws as specific legislation that takes precedence over more general legislation, such as the federal *Fisheries Act*, for example.

When efforts such as those relying on more administrative control or the creative use of the *Indian Act* have failed to accomplish their purposes, Indian governments have used still other strategies, such as direct action. The efforts of the Haida to protect their hereditary rights over Lyell Island in British Columbia and those of the people of Kahnawake to protect their aboriginal right to trade and police themselves under international treaties are but two of many such examples of this approach.

As they strive toward a fuller expression of their authority to govern themselves, Indian peoples have experienced a recurring set of organizational challenges in their governing institutions. The ten most common of these are:

1. *Complexity*. Indian governments must undertake many different functions for their citizens. Often, these governments represent populations with relatively many needs. The resulting task is complicated and, frequently, perplexing.

2. *Smallness*. A handful of bands in Canada have more than six thousand members. Many have five hundred or less. Smallness has its advantages. It can also have disadvantages, such as limited resources and diseconomies of scale.

3. *Localism.* Indian governments are much more than municipal governments; that is, they are more than governments that exercise delegated powers of a limited, if still substantial, nature at the local level. Nevertheless they are, for the most part, local governments in a spatial sense and as such they have very direct influences on their citizen's lives. The various interests they represent and affect are all characterized by overlapping and close proximity. At the local level, for instance, it is harder to separate public from private interests.

4. *Accountability.* Who are Indian governments more accountable to—the federal government or their citizens? How can they be accountable? What indeed does accountability mean? Given the unique nature of Indian governments, as far as the Canadian federal system is concerned, these questions are difficult to answer.

5. *Cultural Engagement.* The organizational cultures of Indian governments are often quite different from those of other governments. The values are dissimilar in many ways; so too, are the behavioural dynamics. Indian governments are, in a sense, caught between two cultures, and they must mediate and steer the way between these cultures. The result is not always conflict, but it is intense engagement.

6. *Continuity of Tradition.* Indian governments in Indian communities cannot avoid these questions: What is the role of traditional authority? What law is primary, Indian or non-Indian? How can the traditional power of clans and hereditary chiefs be represented in modern, rationalized organizations?

7. *Intergovernmental Relations.* Indian governments are part of a web of relations—financial, jurisdictional, administrative, legal, and political—involving many governments. As a result of their multiple responsibilities and because their legal and practical role in the federal system has not been adequately worked out, Indian governments have to engage in an exceptionally large number of interactions with other governments. The consequence is a very practical problem of time and resources.

8. *Finance.* Indian governments frequently do not control their funding sources. Often funding is inadequate to the task. Sometimes there is little match between available financial resources and the nature of the tasks to be performed. More and more, funds may come from many sources.

9. *Politics and Administration.* Indian governments are political. They formulate policy and represent specific interests. They also administer programs and services. How are political responsibilities balanced with administrative ones? How can politics guide administration? How can administration be fair and efficient?

10. *Institutional Roles.* Indian government is composed of many governments at the band, tribal, and service levels. What are the roles and responsibilities of these respective governments? How do they relate to each other?

Some of these challenges are experienced by all governments. Others are more specific to Indian governments.

Indian peoples and their governments have responded to these challenges in a diverse and multifaceted way. In recognition of this diversity, subsequent chapters will attempt to place the practical issues of Indian self-government into a more orderly perspective, and to show how Indian governments have pursued the principles of Indian government through the practice of governance within a polity that has neither accepted these principles nor recognized Indian peoples as citizens of First Nations as well as citizens of Canada.

# 2

# The Jurisdiction of Indian Governments

Jurisdiction is critical for governments. Jurisdiction defines the basis for governmental activity. Jurisdiction is the right or power of administering law. Jurisdiction gives a government the right to steer and guide the course of matters such as health, education, transportation, community services, economic development, and resource use. Jurisdiction is a primary issue for First Nations governments because it dictates what these governments can and cannot do, and from whom they may expect or require compliance. "The question of jurisdiction extends to every decision which a native government might make. For this reason questions of jurisdiction will continue to arise and will do so increasingly" (Reiber). Sorting out the matter of jurisdiction is a key part of solving the puzzle of Indian self-government in practice (Cassidy, 1988e).

## The Authority to Govern: A Contested Matter

The various jurisdictional powers of a government may be understood in terms of three parameters: the *range of actions* to which these powers extend, the *citizens and subjects* of the government, and the *intergovernmental setting* in which the government operates. When Indian governments in Canada are considered, there is no overall consensus on any of these elements of jurisdiction. This is true when the powers of Indian governments themselves are considered, and it is true as far as the powers of the federal and provincial governments in relation to Indian peoples and their governments are concerned. One result is that the practical, day-to-day operations of Indian governments are sometimes problematic, and the governing needs of Indian peoples are sometimes improperly met.

From one perspective, the matter of jurisdiction for Indian governments should be a very simple one. They either have it or they do not. Unfortunately, the matter is not so simple. There is more than one viewpoint concerning the originating point for the jurisdiction of these governments. For the most part, Indian governments believe they govern on the basis of their own authority, an independent and inherent authority. They maintain that their jurisdiction is a quality that no one or no other government ever has taken or can take from them (Opekokew, 1980).

Canadian federal and provincial governments, as well as many municipal governments, see things differently (Cowie). They perceive jurisdiction to be the property of the federal and provincial governments, to be shared as outlined in the Canadian Constitution, or as agreed upon by these two levels of government. They perceive Indian governments to be local governments, to be governing entities with lesser powers because the powers they exercise are essentially municipal and administrative in nature. They assume Indian peoples to be subject to provincial and federal powers only, even though these powers may be delegated to Indian governments.

This dispute is complicated by the fact that Indian governments, especially over the past twenty-five years, have come to occupy jurisdictional fields that are usually taken to be exclusively or concurrently federal or provincial. For instance, Indian governments frequently are involved in decisive ways in the management of natural resources, education, justice systems, child welfare, and health. As matters currently stand, Indian governments may be viewed as an anomaly within the Canadian federal system, an anomaly in terms of theory as well as practice, an anomaly which will have to be addressed sooner or later.

The dispute about the role of Indian governments will continue to revolve around questions such as: What kind of authority do Indian governments have? What fields of jurisdiction may they occupy? With which, if any, other governing entities, must they share their governing powers? Who is subject to the various authorities of Indian governments? How and in what forum may differences concerning the jurisdictional power of Indian governments be settled? These are some of the questions that are critical to the meaning of Indian government in practice. The starting point for understanding the possible answers to these questions is a recognition of the intricate approach Indian and other Canadian governments take in relation to the jurisdiction of First Nation governments.

An array of jurisdictional issues is involved in the recognition and implementation of Indian government (Nahwegabow). As Indian governments operate, authority is exerted over a range of matters such as:

- private property, its use, management, and disposition;
- natural resources, their use, management, and disposition;
- the environment, its regulation, protection, and enhancement;
- communications and transportation;

- education, cultural development, health, recreation, community care, income support, and housing;
- law enforcement, legal assistance, domestic relations, and judicial authority;
- economic development, trade, energy development, employment, and labour relations;
- taxation and finance;
- census and statistical services; and
- community works and public utilities.

The Constitution refers to aboriginal rights in several places, but the definition of these rights has not been agreed upon, so it is difficult to see if they provide for a recognition of separate or concurrent jurisdictional powers on the part of Indian governments in relation to the above matters.

If the range of jurisdiction of Indian governments is a cloudy matter, so, too, is the nature of the power of these governments as well as that of the federal and provincial governments over Indian peoples as citizens and subjects of governments. According to Section 91 (24) of the Constitution, the federal Parliament has exclusive jurisdiction over Indians and lands reserved for Indians. All laws of general application in force in each province are applicable to Indians, except to the extent that such laws discriminate against Indians as Indians or are inconsistent with or redundant to the federal *Indian Act* and the orders, rules, and regulations made within its authority. The courts have provided a wide range of rulings on the applicability of various provincial laws. On reserves, they generally apply only as a result of provisions within section 88 of the *Indian Act*. In most cases, for instance, the courts have decreed that provincial child welfare legislation applies to Indians, as do provincial highway and traffic laws. The courts have not ruled in many instances, however, that provincial wildlife legislation applies to Indians on reserve. These and many other matters are still in question.

The intergovernmental setting in which Indian governments exercise their jurisdictional powers is a turbulent one. As governments have failed to address the authority of Indian governments relative to federal or provincial authority, recourse has been taken to the courts. As Jesse Reiber noted over a decade ago, rather than a body of case law which maps out Indian governmental powers in a clear and consistent manner, "what has emerged is a zigzag pattern of decisions which have only served to further confuse the issues and frustrate the parties to these issues."

Which government or governments has jurisdiction over Indians? What role do Indian governments have in relation to Indian people? Are the laws of these governments primary in certain areas of public activity? These questions can be supplemented by others: Are non-Indians who are on reserve land subject to Indian government? Are Indians who are *not* on these lands subject to these governments? What recourse do non-Indians who adversely feel the consequences of the activities of Indian governments have against these governments? The intergovernmental setting as well as the extent of the jurisdictional authority of Indian governments remain as paradoxical aspects of the Canadian federal system. The citizenship status of Indian peoples in Indian and other governments remains no less indeterminate. Such is the jurisdictional context of Indian government in practice.

## The Indian Perspective: Jurisdiction as Inherent Authority

Just what do Indian peoples mean when they assert the inherent jurisdiction of their governments? As members and representatives of First Nations, Indian peoples give varied expression to this claim. The resulting differences reflect diverse traditions of government as well as experience with non-native peoples. Quite often, Indian governments act in ways that are at odds with their assertion of inherent jurisdiction, although seldom will they deny or renounce it. There is a remarkable consistency among First Nations concerning the origin, constitutional status, extent, and applicability of the inherent jurisdiction of their governments.

Many First Nation governments find their ultimate justification in terms of the power of the creator and the kindness and wisdom they believe this power showed to their forefathers. It was this power, they maintain, that originally determined the activities and subjects of their jurisdiction, empowered their citizens, and gave them a status equal to that of the governments of other nations.

The history of Seklep, "Coyote, the teacher, gentle trickster and law-giver," as told by the Shuswap people of southeastern British Columbia, provides an example of the way in which Indian peoples see the origin of their governments. Coyote, the Shuswap explain, introduced them to their social institutions and laws. He taught them to provide for and defend themselves. He led "the different tribes to the countries they now inhabit." He went away with the "Old One, high chief of all spirit people." As the story is told in one version:

> In the before times, the Old One sent Coyote to travel over the land of the Indian and make it right. He was sent because at the time the earth was much troubled by great fires, winds, famine and floods. There was much that the Indian needed, and during that period there were many kinds of animals, birds, and fishes that did not exist, many kinds of trees, plants and berries....
>
> He introduced to the Indian people the sweat lodge, the pipe, the ceremonies, the winter dances, and gave our people the sacred laws we must live by. He also taught the people many methods of catching, procuring and preserving food; and how to make certain kinds of weapons and tools.
>
> He made to be brought forth many new kinds of plants and put them in places where they were required. He also brought forth many kinds of animals.... Coyote introduced the salmon into the river and trout into the lakes, and taught the people how to catch and prepare these foods. Many things he has done for the Indian people, but many things he has left unfinished, promising to return at the end times. Before he left, the last thing he did was to take and lead the different tribes to the countries they now inhabit; till this time they were all crowded together; and gave them the languages they were to speak.

No one but the Coyote, a supernatural power, a power beyond nature, the Shuswap people assert, gave them their land, laws, and powers. No other person or persons gave the Shuswap the authority to govern themselves. In the traditional Shuswap view of the world, "the earth was a place made good for them in which to live." They found order in the world and they governed themselves as part of this order. This authority was inherent in the way nature was made. It could not be changed except by a new act of creation.

For the Shuswap, as for many other Indian governments, inherent jurisdiction means sovereign jurisdiction; it means the independent right to make laws and institutions for the Shuswap people and their territory. Proceeding on this view, the Chiefs of the Shuswap, or Secwepeme as they are also known, in 1983 formally reaffirmed their sovereignty over and within their traditional territory. Asserting that they had never ceded this sovereignty, they declared independent and ultimate jurisdiction over the "lands, waters, air, and all the resources" of a wide area of southeastern British Columbia (Shuswap Nations Tribal Council).

As the Shuswap view illustrates, many Indian peoples assume Indian governments to have inherent jurisdiction. They interpret such jurisdiction as a "right" due to them, reflecting their role in the natural order of things. Further, they maintain this right is one spiritually grounded in the land and its resources. This explains why almost all Indian governments argue that the right to self-government cannot be detached from land and resource questions — or from matters of constitutional concern (Assembly of First Nations, 1980, 1982, 1984a).

The Shuswap are not unique among Indian peoples in Canada in their outlook on the matter of jurisdiction. "*We* have the *right* to determine our rights and our priorities, not the government," the Mohawks of Akwesasne maintain (Akwesasne Mohawk Council, et al.). The Mohawks are one of the Six Nations which make up the Haudenosaunee Confederacy, the others being the Oneida, Onondaga, Cayuga, Seneca, and the Tuscarora Nations. "Before the arrival of the Europeans in North America, at the time of the founding of the Haudenosaunee Confederacy, the Peacemaker gave us a message from the Giver of Life, the Creator," the members of the Confederacy assert, much as the Shuswap do. From the founding of the Confederacy, the Six Nations have handed down the *Kaianesakowa*, "the Great Law of Peace." This law provides "constitutional authority" for their governments (Haudenosaunee). It determines the legitimate activities, the rightful jurisdiction of their governments, the powers of their citizens, and the status of these governments as far as other governments and their citizens are concerned (Jennings).

The Haudenosaunee Confederacy asserts that it meets the fundamental requirements of nationhood and that its members are the "proper subjects" of international law, not Canadian law (Haudenosaunee). The confederacy reaches across the borders of Canada and the United States. In Canada, the Haudenosaunee reside in Quebec and Ontario. Nevertheless, they maintain they are an independent nation. The Haudenosaunee point out that their Constitution, the *Kaianesakowa*, includes provisions concerning the principle objectives of political life as well as the definitions of the main institutions of government, the division of powers among these institutions, and the relationships between governments and the people, as do the constitutions of many nations in the world. The *Kaianesakowa*, they assert, provides for:

- checks and balances against the abuses of power;
- equal but definitive powers for men and women;
- a recognition of women as the bearers of hereditary lineage;
- methods of adopting foreign nationals;
- the rights and duties of the people of the Confederacy;
- the rights, qualifications, and duties of its political leaders;
- procedures for authoritative political decision-making;

- procedures for impeachment; and
- methods to maintain the accountability of political leaders to the sovereign will of the people (Akwesasne Mohawk Council, et al.).

The peoples of the Haudenosaunee Confederacy propose that the jurisdiction of their governments is based upon this body of law, a law separate from that of Canada. When they interact with Canada, they see themselves as one nation interacting with another nation, and their government as one independent government interacting with another (Mohawk Council of Akwesasne, et al.). They see intergovernmental agreements with Canada as treaties made by "parallel, equal and separate governing systems" (Akwesasne Mohawk Council, et al.). Such agreements, they maintain, are symbolized by the "Gus-Wen-Tah" or the Two Row Wampum. The Haudenosaunee explain that:

> Probably the first time that the Two Row Wampum agreement was made with a European power was with the Dutch. Symbolically, there was a river flowing called the River of Life. In the River of Life, it was agreed that the Haudenosaunee and the Dutch would travel together, side by side in parallel paths which would never cross or meet. In their vessel, the Dutch agreed to keep their government, their laws, their ways and beliefs. In our canoe, the Haudenosaunee were to keep our laws, our ways of government, our traditions and beliefs. Neither the Haudenosaunee nor the Dutch were to make laws over each other.
>
> The principles of the Two Row Wampum became the basis for all treaties and agreements that were make afterwards with the French, the English and later the Americans (Haudenosaunee).

Another symbol of the relationship between the Haudenosaunee and other nations is the Covenant Chain or Silver Chain Covenant. This chain, "pure, strong and untarnished," can bind separate nations together without causing them to lose their independence. Because the chain is silver, it continuously needs to be "polished" and kept in a "healthy" condition (Haudenosaunee). This is how the Haudenosaunee interpret their relationship with Canada and the intergovernmental setting of their governments. They dismiss the idea of delegated powers out of hand. Their relations with Canada, they assert, are governed by international law and convention (Johnston).

The Mohawk see themselves as dealing on a "bilateral basis" with the federal government on matters such as land and resources, policing, the judicial system, financial relations, citizenship, education, social services, international relations, language, and human life (Mohawk Council of Akwesasne, et al.). Any assertion of provincial powers in this context, they argue, is a hindrance. As the Mohawks of Akwesasne, Kahnawake, and Tyendinaga have stated:

> In matters presently under the imposed provincial jurisdiction, we are determined to remove any laws of general application . . . which are applied to our territories in the absence of recognized Mohawk laws. The concept of provincial jurisdiction is in direct conflict with federal-Indian relationships that we are seeking to re-establish. (Akwesasne Mohawk Council, et al.)

The forefathers of Canada, the Mohawk maintain, established a relationship with their Mohawk forefathers which allowed Canadians to share Mohawk land. This is the proper basis for the relationship of Mohawk government and the Government of Canada. "In return for the land," the Mohawk maintain, "a trust responsibility has been incurred by the non-Indian government . . . Indian trust moneys are not taxes, but a share of our own natural resources. . . . Funding should not be a benefit given at the government's whim. It should be in the form of transfer payments similar to present fiscal arrangements between federal and provincial governments" (Akwesasne Mohawk Council, et al.). The federal government's trust responsibility, the Mohawk argue, reflects the ultimate independence of their nation. The Mohawk government has the ultimate financial jurisdiction over the wealth of its people. Financial jurisdiction is for the Mohawk, as for other Indian peoples, an integral part of the inherent jurisdiction of their governments.

The Mohawk do not ask for or negotiate the jurisdiction of their governments. They take it or assert it as they need to do so. Thus, as the Mohawks of Kahnawake are fond of saying: "In Kahnawage, we show and then tell. We do not tell and then show." In other words, the Mohawks of Kahnawake determine the activities and citizens of the jurisdiction of their governments by themselves, in line with their needs, traditions, and capabilities, and once they have done so, once they have "shown" what they want, they "tell" it to other governments with which they maintain relations. They do not "tell" other governments what they want first. They have no need to do so. As with the Shuswap and other Indian governments, Mohawk governments see themselves as taking their authority and power from their people and Creation, not from the laws of Canada.

Just as the Shuswap and Mohawk do, the Prairie Treaty Nations of Alberta, Saskatchewan, and Manitoba maintain that: "The Indian Nations will, without any other consent required, assume jurisdictional control of any national matter when the Indian Nations Government choose to do so" (Prairie Treaty Nations

Alliance). Not only can Treaty Nations assert their jurisdiction as they wish, they maintain, they may also "exercise extraterritorial jurisdiction," over the citizens of their jurisdiction as they decide to do so, that is, they may exert binding authority over their citizens even when these citizens are not resident in geographical areas bounded by their own government. On this basis, for example, the Prairie Treaty Nations argue, provincial child welfare laws or the federal criminal code do not apply to Treaty Indians living on or off Indian land (Prairie Treaty Nations Alliance).

By virtue of their treaties with Canada, the Prairie Treaty Nations assert a unique relationship with Canada. The nature of this relationship, they maintain, is similar to a landlord-tenant relationship. As the rightful owners of the land, the Prairie Indian Nations perceive themselves to be the signatories of various treaties by which they agreed to share that land with Canada in return for clear and certain rights to be recognized by Canada. Among these are full jurisdiction by Indian governments over lands reserved for them and adequate funding by Canada to Indian governments for necessities such as health and education.

Educational funding, for instance, is seen by the Prairie Treaty Nations as a rental payment to Indian people for sharing land with Canadians. The acceptance of such funding by Indian governments, the Prairie Treaty Nations argue, is not to be taken to imply that their educational activities are conducted under delegated powers. Financing education along with the other fiscal responsibilities of the Government of Canada is "an integral part of Canada's trust responsibilities," as laid out in treaties (Prairie Nations Treaty Alliance). These responsibilities reflect the responsibilities of Canada as a result of agreements sanctioned by international law. Under international law, the Treaty Nations argue, governments have the authority to regulate finance. Much as the Mohawks do, they assert that Canada's trust responsibilities are a key aspect of this authority.

As the governments of independent nations, the Prairie Treaty Nations argue, Indian governments also have taxation powers. These powers have not been ceded to Canada as part of any treaty. They can be used to finance services for the citizens of Indian governments. Treaty rights create a special bilateral relationship with Canada, the Prairie Treaty Nations contend. Provinces have no real governing role in relation to the internal or external affairs of these nations, they insist, and thus, provincial governments cannot rightfully interfere with or disrupt Indian governments in any way. In its presentation before the First Ministers Conference in April 1985, for instance, the Blood Tribe declared that: "We do not recognize the competence of provincial governments to participate in any constitutional undertaking concerning our rights.... The Blood Tribe views Section 91 (24) of the *Constitution Act* of 1867 as constitutional recognition of our bilateral relationship with the Crown. This simply gives the federal government the right to deal with First Nations, to the exclusion of the provinces" (Blood Tribe).

Concerning disputes over matters where provincial jurisdiction might normally apply, Prairie Indian governments such as the Blood argue that the message for the provinces is quite clear. The provinces have no real authority over Indian peoples. Provincial arguments concerning the activities of Indian governments must be with Canada. Moreover, provincial governments have no formal intergovernmental relationships with Indian governments, other than those that Indian governments desire to create on a circumstance-to-circumstance basis. For Indian governments, the Treaty Nations contend, the provincial interest is part of the overall Canadian government interest—and it is no more. This, they assert, is the character of the intergovernmental setting within which Indian governments determine and exercise their sphere of authority over their rightful subjects.

Several of the provinces, the federal government, and various academic authorities ask: "What is Indian self-government? What does inherent jurisdiction mean?" Indian peoples from Quebec, Ontario, Manitoba, Saskatchewan, Alberta, and British Columbia come from varied historical backgrounds. They represent many different nations, but each articulates a generally consistent view of the jurisdiction of Indian governments. They state that the jurisdictional powers of their governments are:

- inherent, having their origin in acts of creation;
- based upon traditional laws;
- rooted in a very special relationship with the land and resources;
- constitutional as well as functional, that is, they include the right to determine, for example, basic political constitutions and requirements for citizenship as well as to provide for the social, economic, cultural, and political well-being, in the broadest sense, of their citizens;
- fiscal, including the right to control external relations concerning land and resources, as well as to tax and collect revenues;
- independent of the jurisdiction of Canadian governments and protected by international law, as well as convention; and
- assumed and asserted as these governments perceive a need to do so.

There are no matters of governance in which Indian governments do not assert, at least in principle, inherent jurisdiction (Cassidy, 1988e). They affirm the rights to govern policing and justice, health, education, child welfare, communication, and all other governmental services, as well as the management of land, natural resources, and the fiscal relations that touch upon the territorial and demographic domains within which they exert authority. In some instances, such as in the cases of the Six Nations, the James Bay Cree, or the Haida, they assert their right to participate and be treated as independent nations in the international arena. Indian governments affirm the authority to be active in every activity of government. They also affirm the authority to govern their members on and off the lands under their jurisdiction, and to govern the activities of nonmembers on Indian land.

Indian governments assert wide powers over and for their citizens. Moreover, in the intergovernmental setting in which they find themselves, these governments assert that their powers are either equal or superior to but not subject to alteration on the part of other governments, whether they be federal, provincial, or municipal. In fact, many Indian governments assert that the only true intergovernmental relationship they must maintain within Canada is with the federal government. These First Nations governments thus assert special rights within—or more correctly, beyond—the Canadian federal system. As a result, the concept of inherent jurisdiction plays a large role in determining the meaning of Indian government in practice.

## The "Canadian" Perspective: Jurisdiction as Delegated Authority

The Indian view of jurisdiction is not shared by other Canadian governments. For the latter, the jurisdiction of Indian governments is created by the Crown and the Constitution of Canada. It is delegated by federal and provincial governments. Just as the concept of the inherent jurisdiction of Indian governments plays a large role in determining the meaning of Indian government in practice, so, too, does the view that Indian governments are creatures of other, more "senior" governments. Paradoxically, the activities of Indian governments which assert that they have inherent jurisdiction frequently reinforce this latter view, as these First Nations governments often use delegated powers to insert themselves in a pragmatic way into governing fields they cannot occupy in any other practical manner. In this way, many Indian governments have become a part of the existing federal system, in practice, if not fully in principle.

As the federal and provincial governments interpret the matter of jurisdiction in relation to Indian peoples and governments, they proceed on the premise that the main vehicle for the exercise of the federal government's power over Indians and Indian lands is the *Indian Act* (Slade). Where the *Indian Act* does not apply, then other federal and provincial laws do. Only in instances where the courts have ruled that Indians have aboriginal rights, do exceptions to this general rule apply. Even in such instances, the federal and provincial governments argue, it is their prerogative to balance such rights with those of other interests. The federal and provincial governments may and often do differ about their relative jurisdiction over Indians and Indian lands, but, for the most part, they agree that Indian governments operate under the powers granted to them by the *Indian Act*. A few Indian governments, such as the Sechelt of British Columbia and the Cree-Naskapi Bands of northern Quebec, have negotiated legislation that has allowed them to constitute their governments under federal and provincial authority other than that delegated through the *Indian Act*, but this Act is still the key to the legal regime under which almost all Indian governments operate as part of the federal system.

The *Indian Act* creates "non-Indian styled" bands as the basic institution of Indian government. It defines the basis of membership in and requirements for election to those governments, lays out their powers, outlines the relationship of provincial governments to Indian peoples and lands, and establishes a regime for the management of reserve lands and the economic activities of those who belong to bands. According to the *Indian Act*, Indian governments are subordinate governments. They are "junior" governments. As a Saskatchewan Court ruled in 1982 (Hawley):

> ...an Indian band council is an elected public authority, dependent on Parliament for its existence, powers and responsibilities, whose essential function is to exercise municipal and government power—delegated to it by Parliament—in relation to the Indian reserve whose inhabitants have elected it; as such, it is to act from time to time as the agent of the minister and the representative of the band, with respect to the administration and delivery of certain federal programs for the benefit of Indians on Indian reserves, and to perform an advisory, and in some cases a decisive role in relation to the exercise by the minister of certain of his statutory authorities relative to the reserve.

The Parliament of Canada, according to a viewpoint such as this, obtains its authority directly from the Constitution. Indian governments do not; they are the agents of the federal government. They are there to deliver services for and provide advice to the federal government. They "depend" on the federal government for their existence. These assertions provide a dramatic contrast to the statements by many Indian governments that they have inherent jurisdiction, that they depend on Creation, not the federal government. The contrast does not stop at this point.

Many Indian governments maintain they govern on the basis of traditional law, that their form and membership is a reflection of their own authority; but the *Indian Act* implies otherwise. The Minister of Indian Affairs, according to this Act, is the ultimate authority on all matters concerning the only legislatively recognized Indian governments—band governments. On the basis of their claim to inherent jurisdiction, many Indian governments maintain that they have authority in every sphere of jurisdiction. According to the *Indian Act*, their authority is limited only to those activities that are outlined in the Act, particularly in Sections 81 and 83.

Many Indian governments assert that they have independent jurisdiction over their membership, whether their members, or more properly, their citizens, be on or off Indian lands. They contend that non-Indians on Indian land are subject to their jurisdiction. According to the *Indian Act*, those who are members in Indian governments have only certain, limited rights. They are "members" not "citizens" (Cassidy, 1988d). The powers of Indian governments over non-Indians on Indian land are severely restricted.

Many Indian governments affirm an equality with the Government of Canada under the terms of international law. According to the *Indian Act*, Indian governments are more like municipal governments in an intergovernmental setting where the federal and the provincial governments are the only governments with exclusive powers which have not been delegated to them. Indian governments see themselves as national governments. A Quebec court has ruled, however, that the powers created in the *Indian Act* "are first of all, powers to regulate, and to regulate only 'administrative status.' In other words, a band council has, in this area, the same sort of legislative powers as those possessed by the council of a municipal corporation" (Hawley).

According to the *Indian Act*, band councils may make bylaws, that is, laws pursuant to delegated authority by the federal Parliament. They cannot make laws, only bylaws. These bylaws must be consistent with the *Indian Act*, or "with any regulation made by the Governor-in-Council or the Minister." They may be made for a variety of purposes, including the need to:

- control band membership;
- provide for the health of residents;
- regulate commerce, traffic, construction and buildings;
- assure the observance of law and order;
- prevent disorderly conduct and nuisances;
- construct and maintain water supplies, roads, bridges, and other public works;
- zone and distribute reserve land;
- control the residence of band members and other persons on reserve;
- regulate animal populations;
- remove trespassers on reserve land;
- provide for the rights of spouses and children who reside with band members on reserve; and
- impose, on summary conviction, fines not exceeding $1,000 or imprisonment for a term not exceeding thirty days, or both, for violations of band bylaws.

These and other powers of band councils are provided subject to the Minister's power of disallowance of such bylaws. They are also limited by the Minister's power to regulate, as outlined in Section 73 of the *Act*, many of the same governing functions as are delineated in Section 81. If a Section 81 bylaw is at odds with regulations made pursuant to Section 73, the bylaw has no effect. The Minister has made many such regulations, including one governing band council borrowing procedures, elections, and revenue monies, as well as ones regarding Indian estates, health, mining activities, and reserve lands. Accordingly, the federal government may make regulations to adopt laws and regulations which are in force in provinces, and by this method, nullify any bylaw passed pursuant to Section 81 that is not consistent with a provincial law of general application (Slade).

While most often not accepting this view of jurisdiction in principle, Indian governments frequently accept the necessity of realizing it in practice. While asserting the inherent jurisdiction of Indian governments, band governments will often make the fullest uses of the powers delegated to them under the *Indian Act*. Moreover, they will use and, if necessary, fight for the services provided by the Minister and his Ministry. They will do so not because they accept federal authority or the current Canadian federal perspective, but because to govern in practice they must articulate the principles of their authority in a variety of pragmatic ways. So, for example, Indian governments will engage in and advocate a process of devolution, that is, the transfer of federal and provincial responsibilities to band and tribal councils acting under the *Indian Act*, even though these First Nations governments do not accept the authority behind this Act. Such a process involves a mixing of perspectives concerning jurisdiction, and this mixing of perspectives is one of the critical characteristics of the meaning of self-government in practice.

The Six Nations Band in southern Ontario provides one example of how such mixing of perspectives works in practice. The *Indian Act* band council system of government was established on the Six Nations Reserve in 1924. Since 1924, the Band Council has not been recognized by 40 percent of the population of Ohsweken, the village on the reserve. This group continues to adhere strictly to the traditional system of Six Nations governance. Despite this fact, the presence of Indian and Northern Affairs Canada (INAC) is well established on reserve. INAC has several offices and employs several people across a variety of program divisions, such as economic development and education. These employees serve both the Six Nations and the Mississaugas of the adjacent New Credit Band. Many federal government employees on the Six Nations Reserve are members of the band, and as such, play a major role in band activities. They attend council and committee meetings. They co-ordinate and interact with band employees on a daily basis.

The Six Nations Band Council appears to be quite content to maintain its current relationship with the Government of Canada and with Indian Affairs. From its perspective, Indian people are delivering services to Indian people. According to members of the council, Six Nations may be ready to achieve greater self-government and independence from INAC in the early 1990s, but it will need guaranteed funding from the Department, at least until the turn of the century. Meanwhile, the Six Nations Band Council has used its powers under the *Indian Act* and various other delegated federal and provincial powers to administer, facilitate, negotiate, or provide liaisons with those who provide an impressive array of services on reserve for its members. (Six Nations and New Credit Reserves). The modern Gane' Yohs Community Health Centre provides medical and dental care. Iroquois Lodge is a remarkable community nursing home. Drug and alcohol counselling is provided by the Native Peoples' Alcohol and Drug Centre, which is governed by an elected board of directors and receives funding from Health and Welfare Canada. Many similar agencies exist.

Not all bands who work under the *Indian Act* follow the same patterns as the Six Nations Band. Many have neither the large, traditional, dissident group nor the degree of satisfaction with INAC that the Band Council of Six Nations has. The Squamish

Band, whose reserves lie in several locations around Vancouver in southern British Columbia, provides an example of a band that has experienced considerable dissatisfaction with the performance of Indian Affairs, but that, nevertheless, has made significant progress in achieving greater self-government by using *Indian Act* powers.

Prior to 1967, the INAC district office conducted virtually all band business for the Squamish. The District Supervisor chaired all council meetings and, in that capacity, set agendas and formulated resolutions for approval of the band council. As an agent of the federal government, the District Supervisor also negotiated all leases. Given the band's valuable land base, this was a large responsibility. Over time, the band became very dissatisfied with INAC's actions on this and other matters. In the late 1950s and early 1960s, Park Royal in West Vancouver was the first regional shopping centre to be built in Canada. It was built on Squamish land. The band believed that the terms and conditions negotiated for the Park Royal development by INAC did not reflect market values at the time. This irritated the band greatly. So did its perception of the performance by INAC in leasing out summer home lots (many to INAC employees) situated on reserve lands in Gibsons Landing to the west of Vancouver.

The Squamish Council took control of band business in the early 1970s. The council's initial priority was to renegotiate all leases to ensure its land administration was in a financially correct position. To carry out this function, it established an economic development committee and department, and it retained the services of lawyers to complete the necessary technical work. To the early 1980s, land management issues constituted the bulk of band business. With the successful renegotiation of the majority of leases, the council's attention recently turned to expanding employment opportunities for band members through economic development, and expanding its ability to deliver public services formerly administered by INAC.

The Squamish Band has made strong use of the bylaw powers provided under Section 81 of the *Indian Act*, in particular to enhance its ability to manage fishing resources. To do so, it has frequently engaged in activities which have brought it into court. In the Baker case, for example, the accused was a Squamish band member charged, under the British Columbia Fisheries Regulations, with unlawful fishing in the Squamish River. The band had previously passed a fishing bylaw to regulate fishing on reserve. The judge ruled that the Squamish bylaw was effective within the boundaries of the reserve and that, "the application of the *Fisheries Act* and Regulations in a case where a properly drafted and enacted Indian

Band bylaw is in existence ceases at the boundary of the reserve if the two are in conflict." In a subsequent case, *Joseph and Lewis*, the character of the band's provisions for the management, preservation, and protection of its reserve fishery was contested. The court ruled that if a band has the power under the *Indian Act* to enact a fishing bylaw, then "that is the end of the matter. It is not for the Court to determine the wisdom of the Band's scheme for managing its fishery." Rulings such as those in the *Baker* and *Joseph and Lewis* cases have confirmed band powers under the *Indian Act* as being capable of providing a firm, if limited, basis for band self-government over natural resources on reserves.

The Pas Indian Band in northwestern Manitoba provides another example, one of many that could be cited, of a band council that has extensively used the powers delegated to it under the *Indian Act* to obtain and administer a variety of services and foster economic development strategies for its members, and thereby, to augment the degree of self-government it enjoys (Connell & Connell). The band has been engaged in the process of pragmatically creating a considerable measure of self-government under the *Indian Act* over a twenty-year period—even though it ultimately does not accept the authority underlying this Act.

The Pas started by requesting and receiving the authority to control, manage, and expend band revenues; hire a band manager; and take over the delivery of social service programs. It then established a committee and department structure and focused on the improvement of the village infrastructure as well as economic development. Next, it moved into delivering health services and developing municipal-style powers. As it continually strengthened each of these thrusts, it extended its operations into areas such as education, fire prevention and control, alcohol and drug abuse programming, and long-term care services for the elderly. These services, many of which are provided on the basis of working agreements with municipal, provincial, and federal governments, are administered by approximately seventy full-time staff, with the assistance, on a seasonal basis, of fifty additional staff members, under the direction of the Chief and council. The Chief and Deputy Chief are full-time employees of the council. The remaining eleven councillors are paid for attendance at council, board, and committee meetings. Next to Manitoba Forest Industries, The Pas Band is the second largest employer in the area. Approximately 85 percent of its staff is Indian.

In addition to exercising authority under Section 81 of the *Indian Act*, The Pas Band applied for and was granted authority to exercise local control over the management of reserve lands under Sections 53 and 60 of the Act. In addition, well before the recent taxation amendments to the *Indian Act*, it was granted, under Section 83, the authority to make bylaws for raising money through assessment and taxation of interests in reserve land. These powers may be seen as quasi-municipal ones. In order to develop and implement them, the band incorporated The Pas Band Development Authority (B.D.A.) in 1976. "The B.D.A. was seen as a means by which the Band might derive revenues without incorporating itself or coming under the jurisdiction of provincial municipal legislation" (Connell & Connell).

The Pas Indian Band's approach to self-government by providing a range of social and economic services, pursuing economic development, and developing a municipal-government style of service delivery is designed to work within the framework created by the *Indian Act*. "To date, government development of The Pas Band has to a large degree meant assuming responsibility for the delivery of a wide range of services. Program administration constitutes one component of a government system. While the Band has control over program delivery at the local level, policy control in many areas remains with the federal government" (Connell & Connell). Ultimately, the Band asserts that there is a need for a new framework based upon constitutional change. If such a development is not forthcoming, it may consider formulating its own self-government legislation, to be approved by the Parliament of Canada. In any case, the Band will continue its drive toward more self-government by following a strategy of taking as much power as it can in the short run, within the confines of delegated federal and provincial authorities, while advocating long-run changes of a fundamental nature in these arrangements. Among Indian governments, it is not alone in following such a strategy.

## The Limits of *Indian Act* Government

The *Indian Act* provides band councils with some significant, if delegated, authorities. Many band councils have used the *Indian Act* and the powers it provides to expand Indian government in practice. Such a trend will continue in the future. As David Crombie noted when he was Minister of Indian Affairs and Northern Development: "Many [bands] would prefer, at least initially, to explore options for developing more autonomy and self-sufficiency under the *Indian Act*" (Indian and Northern Affairs Canada, 1986, April 16). Nevertheless, bands face many problems as they attempt to generate more governmental powers under the *Indian Act*.

One problem relates to the degree of powers available under the Act. As Harry Slade has noted:

> On the face of it, Section 81 provides some useful tools for band councils in regulating land use within the reserve and to undertake local works beneficial to the community. No one would suggest, however, the powers conferred under Section 81 are sufficiently broad to enable a band council to regulate anything like the range of matters that can be regulated by a municipal council under the *Municipal Act* (Slade).

Moreover, as pointed out above, the ability of band councils to make bylaws in accordance with Section 81 is limited by the Section 73 requirement that these bylaws should not be inconsistent with other provisions of the *Indian Act* or any regulation made by the Governor-in-Council or the Minister. There are many other limitations placed on bands as a result of the specific terms of the *Indian Act*. For example, "Since a band does not have corporate status, it cannot acquire or hold real property" (Hawley). As a result, a band's ability to engage in economic development is sharply curtailed.

The *Indian Act* itself is a profoundly contradictory piece of legislation. At the time the Act was originally developed, the doctrine of paternalism, of aggressively protecting the interests of Indian peoples as underprivileged and powerless members of society, was accepted as a "progressive" viewpoint in non-Indian society (Daugherty & Madill). Mirroring this doctrine, the Act placed all power over Indians and reserve lands in the hands of the Minister and his advisors. Indian government was seen to be a tool that the Minister could draw upon as he attempted to take care of the interests of Indian peoples and their lands. It was not until the post-World War II period that Indian governments began to be seen with any great degree of significance by the Government of Canada as tools that Indian peoples could use to govern themselves (Taylor, 1984a). This dichotomy between paternalism and self-government continues to characterize the *Indian Act*. It is yet another example of the interplay of assimilation and recognition that has marked Canada's relations with aboriginal peoples.

Frequently, the administration of the *Indian Act* by INAC also presents problems to bands seeking greater self-government in a practical sense. Again the experiences of The Pas Band present a good illustration of this aspect of the matter. In working with Indian Affairs, the Band asserts that it has experienced significant delays in concluding matters that require INAC's approval. These delays can cause and have caused problems which have resulted, for instance, in revenue losses to the Band, as prospective lessees of reserve lands have sought alternative arrangements after becoming frustrated with the lapses of time between agreements with the Band and the actual closing of deals which require INAC approval. Sometimes, the Band complains, INAC approval or clarification of its position can take years to happen. Meanwhile, important economic development opportunities can evaporate, and problems of critical importance to the Band can remain unresolved.

The Pas Band often experiences long delays while it is waiting for a ruling from Indian Affairs on bylaws it passes under Section 81 of the Act. Sometimes these delays are caused by a lack of clarity concerning the relationship of federal and provincial jurisdictions. At other times, Band representatives contend, they occur because various divisions of INAC and Department of Justice do not concur on requirements to give effect to bylaws. For example, after extended negotiations between the Band, the local (Kelsey) Manitoba School Division, the province, and INAC, a four-party agreement was reached in 1985 concerning funding for band members enrolled in the Kelsey school system. The Band passed a bylaw to implement this agreement, but this bylaw was subsequently redrafted in Ottawa by INAC. It was then sent to the federal Justice Department's Manitoba region which identified the need for two bylaws rather than one to cover the matter. This requirement was taken care of by the Band, but then another problem arose because the federal government identified a related problem it had not previously noted. This particular issue was finally resolved, but the delay had placed the whole agreement in jeopardy. The delivery of educational services to the Band had been seriously disrupted.

INAC provides bands with many valuable services as well as advice on matters of band government. Yet, many bands in addition to The Pas Band face problems, both similar and otherwise, with the administration of the *Indian Act* by the federal government. The Katzie Band, for example, is a small band located in British Columbia's Lower Mainland area. As a small band it must rely on many agreements with other governments to provide services to meet the needs of its members in an efficient manner. The Katzie Band asserts that it often finds itself torn between the needs and demands of the federal government and its members. It experiences this conflict in a range of ways, from the development and implementation of policy and programs concerning matters such as garbage collection and sewage disposal to those of land use and human resource development. Federal government grants are conditional on the

Band meeting federal government policy goals. These policy goals are often perceived by Band Council members and staff as fulfilling the letter but not the spirit of the effort to generate a greater degree of self-government within the Katzie community.

Given the extent to which the Katzie and other bands depend on federal funds, on the one hand, and the necessities of delivering services to band members, on the other, band governments often find themselves pursuing, for practical purposes, federal government priorities over those of their communities. It is sometimes the case that federal priorities reflect a more practical reading of the situation than band determined priorities do. Nevertheless, the policy-making role and decision-making capacity of band government are often constrained, or seem to be constrained, by INAC decisions and operations under the *Indian Act*.

Most fundamentally, the limits of delegated authority under the *Indian Act* as a basis for Indian government are rooted in the question of control. In the last analysis, INAC is similar to any other federal department. It must be accountable to other federal authorities and Parliament. It must operate as part of a more or less coordinated array of programs and services designed and administered to accomplish general governmental goals. Control must remain with the Government of Canada. Indian governments, which operate under the *Indian Act*, know that this may not be true in practice in each and every case, but they know that without the recognition of independent powers on their behalf, eventually it will always be the case.

Even when bands such as The Pas, Katzie, Squamish, Kamloops, Six Nations, and others administer the bulk of INAC programs under administrative and financial schemes that are specifically identified as ones established to foster the devolution or decentralization of delegated political authority, they frequently maintain that INAC control is as strong as ever. As Robert Simon, the Tribal Director of the Shuswap Nation Tribal Council, notes:

> Each year as the Shuswap advance toward Self-government and Nationhood, more responsibilities are added with an increased administration.
>
> The Department of Indian Affairs have continued their objectives established in the 1960s, that of administration and bands becoming extensions or sub-offices under the Department. . . . The Department would keep all authority over programs, policy and the budget development, with Indian Administration offices as delivery vehicles.
>
> The latest INAC proposal . . . promises more fiscal freedom. . . . However, its major goal seems to be to extend the life of the Department and possibly

> re-route bands from Indian self-government back to devolution (Secwepmc Cultural Education Society).

Many Indian leaders would echo the comments of Robert Simon. They would contend that delegated federal powers under the *Indian Act* are not a path to full Indian government as much as they are a path leading toward bands and tribal councils increasing their capacity to implement INAC programs, which are designed and funded in a centralized fashion and are based on principles that deny the essential spirit of Indian government. For many of those who see government as the exercise of inherent jurisdiction on the part of Indian peoples and their governments, expanded operations under the *Indian Act* and devolution of the delivery of INAC programs are not necessarily steps in the right direction (Stevens, 1988b). Nevertheless, many of those who hold to this view have engaged in such a process because of the practical necessities of governing in Indian communities on a day-to-day basis. These necessities have led to a range of strategies to expand the meaning of Indian government in practice, such strategies touching on some of the most basic elements of governance—citizenship, policy-making, service provision, and finance.

# PART II

# The Elements of Governance

# 3

# Citizenship

The authority to define the criteria, benefits, and responsibilities of citizenship is one of the most treasured of jurisdictional powers claimed by sovereign governments. Indian governments in North America often assert that they have the power to determine their own citizenship (Cassidy, 1988d). The Government of Canada maintains that only it can create citizens and that Indians are citizens of Canada and mere "members" of their bands, of the subordinate governments which provide them with local services.

The matter might be resolved if citizenship were to be defined simply as membership in a government, but citizenship cannot be defined so simply because ultimately citizens can create governments and governments exercise jurisdiction. If Indian nations have inherent jurisdiction, their governments must have the power to create citizens, and their citizens, in one way or another, must have the authority to create governments as they see fit. Or, conversely, if the powers of Indian governments are only delegated powers, then it is Canada, as the source of those delegated powers, that must have the power to create citizens and determine the nature and limits of membership in Indian governments. Citizenship is a critical issue of Indian government.

## The Right to Create Citizens

At some point, usually when fundamental change is about to take or has just taken place, ultimate authority to create citizens becomes a critical question. This issue is raised by the activities and aspirations of many Indian governments today. Specifically, the efforts of Indian peoples to govern themselves raise four sets of questions:

- Who creates and defines the rights and obligations of citizenship for Indian peoples?
- What are these rights and privileges?
- How do First Nation governments choose who is to be a citizen and who is not?
- To what extent are Indian people citizens of Canada and to what extent are they citizens of First Nations governments and how can these different dimensions of citizenship be accommodated to one another?

The answers to these questions are of importance because they reflect the essential character of Indian government in principle and in practice. They determine who is to be an Indian; who makes this decision; and what it means to be an Indian, in relation to Indian as well as other governments. They strike at the core of what it means to be an aboriginal citizen in Canada.

Traditionally, citizenship in Indian First Nations and membership in Indian governments are synonymous. Such a status can come about in many ways. Usually, it is a birthright earned as the result of being born to a parent who was already accepted as part of a First Nation. Among the Gitksan of northwestern British Columbia, for instance, membership is determined by the membership of a person's mother. A Gitksan is born into the House or "Wilp"—the basic unit of political, social, and economic life—of his or her mother. As Heather Harris has noted: "Gitksan citizenship is equivalent to Gitksan House membership. . . . Governing power in Gitksan Society is vested mainly in the House. Each House controls its own affairs and has some say in the affairs of the clan and village to which it belongs."

With the imposition of band government in the late 1800s and early 1900s, the question of membership in Gitksan governments became much more complex than it previously had been. Bands, as defined by Canada, cut across "houses" and clans. Mobility and marriage outside of Gitksan territories grew at the same time. Nevertheless, the Gitksan still assert their right to determine and control the definition and selection of the citizens of their governments.

The traditional dimension of Indian government differs from First Nation to First Nation, but in each case, Indian peoples assert that only those who belong to their nations have the right to create, define and govern their citizens. Canada historically has taken a different approach to the matter (Manyfingers). One basis for this difference is the *Indian Act* definition of what it means to be an "Indian" and the distinctions between Indian status and band membership which flow from this definition.

According to the Government of Canada, people who are Gitksan, Mohawk, Dakota, Cree, or from any other First Nation are "Indians" if, according to the relevant provisions of the *Indian Act*, they are registered as Indians or entitled to be registered as Indians. In Canadian law, an Indian is defined primarily by his or her compliance with the requirements of federal legislation and the system of administration based upon it. Blood relationships and other criteria are of secondary importance or not relevant at all. People who might usually be thought of as Indians, even by other Indians, are not necessarily "Indians" in the eyes of Canada. As the Native Council of Canada (1985) has noted:

> At various times over the years Indian people who have been denied recognition have included:
>
> - Indian women who married men who were not recognized as Indians;
> - Indians who took "Half-breed" scrip or were descended from someone who took scrip;
> - Indians who were "enfranchised" (stripped of status under the *Indian Act*) for any reason, including wanting to vote, to drink, to own property, to live in another country, to become a lawyer or clergyman . . . ;
> - Indian children who lost status because of illegitimacy or whose mother's and father's mother were not entitled to be registered other than through their marriages; and
> - Indians who were omitted from Band lists or the Indian Register who otherwise should have been registered or Indians whose tribes were never recognized as Bands.

The denial of recognition as an Indian is a matter of some consequence. A registered Indian is exempt from taxation on any interest in reserve land or any personal property situated on a reserve. He or she may also be exempt from sales tax on most goods purchased for use on reserve. Registered Indians are the only eligible persons for some grants under federal government programs. INAC may provide such persons with financial assistance, if it is needed, and adequate funds are appropriated by Parliament for a full range of educational programs. Health and Welfare Canada may help with medical expenses, again within budgetary constraints. These benefits are sacrificed by people who, for one reason or another, lose or are denied status as "Indians."

Federally recognized Indian status creates certain special citizenship rights in relation to the federal and, to a lesser extent, provincial governments. For the Government of Canada, this is the crux of the issue of citizenship as far as it applies to Indian people: the Government of Canada creates citizens and it has the authority to recognize individual citizens with special rights. Band membership is an important issue, from this perspective, but it is not a citizenship issue. According to Canadian law, membership in Indian governments is not so much a matter of citizenship as it is a matter of entitlement to certain rights and privileges as a member in a legislatively-created grouping that is more than a registered society and yet less than a real government. Ultimately, the federal government holds the grounds for membership, and the process of choosing members in such groupings is something that must be determined by Parliament. Some powers may be delegated to band governments, but this delegation may only take place within the confines of Canadian law and specifically the *Indian Act* or other special legislation designed for an Indian government.

For Indian peoples, the matter of Indian government and citizenship is a matter that touches deeply on their identity and has many practical implications (Cassidy, 1988d). For it is band councils and the tribal councils with which band councils are affiliated that often are the most important governments on a day-to-day basis for Indian people. Band membership, in general, provides a basis for identity, stability, and benefits for those who enjoy it (INAC, 1986). It is a way to unite with people who share a common language and customs. It means "...the right to participate in the collective decisions of Bands." It means "... the right to share that community's way of life, its resources and its future" (INAC, 1986). Band membership also determines who can enjoy the unique benefits and be entitled to many of the special services and programs designed for Indians. Moreover, band members are entitled to live on and use reserves set apart for the bands to which they belong. Their immediate families are entitled to live with them. Members are entitled to shares of the capital or revenue moneys of a band. They can vote in band elections. They may stand for and be members of their councils.

Indian leaders and governments argue that the right to determine and govern band membership is essentially a significant portion of the right to determine the citizenship of First Nations. As such, they assert, the right is a part of the inherent and aboriginal right to self-government. As the Assembly of First Nations (1987) argues:

> Indian leaders have never agreed that the Federal Government, through legislation like the *Indian Act*, should determine who is recognized as an Indian. The federal government's relationship is to First Nations as collectivities, not to our citizens as individuals.
>
> ... First Nations must exclusively decide citizenship and membership, and the financial and other obligations of the federal government must be negotiated with the First Nations.

From this perspective, Indian people are, first and foremost, citizens in their First Nations. Their primary relationship with the federal government, with Canada, is as part of these First Nations.

This viewpoint has significant implications for the meaning of Indian government in practice as it applies to questions of citizenship. It implies that if a full right to Indian government were recognized, the rights of Indian peoples who are citizens of First Nations would be defined differently from those of other Canadians. They would be defined in terms of membership in certain collectivities, that is, Indian governments, and not in terms of individual characteristics. Indian peoples and their governments would have the right to create citizens, and this right would change the relationship of individual Indian people to Canada.

As Noel Lyon has suggested, such perspectives might mean that Indian people would remain Canadian citizens if full Indian government came about, but their primary allegiance would be to native communities and governments rather than the governments of Canada. To the extent that Indian people would look to their own governments to provide services, they would, Lyon contends, "have no need to participate in other governments, either by way of voting or running for office" (Lyon). Specifically, he argues, Indians would withdraw from "provincial citizenship in favour of tribal allegiance." Essential services and the funds for them would come to Indians in the form of rent for the use of Canada's land base and resources. "It is not just a matter," Lyon writes:

> ... of substituting a native community for a municipality and setting it in the same governmental structure. Rather, it is a case of withdrawing native communities from the usual arrangements into a unique set of relationships with other governments with a wide range of possible variation in the various native communities.

Lyon concedes that at this point the idea of Indian government begins to look very complex and unwieldy. "That," he argues, "is its very nature." It is a cost to be paid by Canada, if full Indian government is going to be a reality.

This is one interpretation of what an Indian right to create citizenship might mean. Roger Gibbins and J. Rick Ponting (1986) argue that perspectives such as the one presented by Lyon could also, in practice, increase the "costs" of self-government for Indian peoples. Such costs might include "reduced aboriginal access to federal and provincial programs, restricted mobility, and reduced protection for individual rights and freedoms." Canada could not allow such costs, they argue, and by way of implication, they contend, Canada could not afford or allow a full form of Indian self-government.

Lyon, Gibbins, and Ponting essentially argue that a full measure of self-government would fundamentally change and to some extent eradicate the status of Indian people as citizens of Canada. This would not necessarily be the case. People can be citizens in more than one government at a time. There is no reason why Indian people should not continue to enjoy the full rights of Canadian citizenship and even special aboriginal rights in Canada, if their governments gain a full measure of recognition. Different governments do different things for people. Governments often overlap with other governments in their responsibilities to and relationship with their citizens, especially in a federal system. Such overlaps become a matter for intergovernmental negotiations and arrangements. They do not necessarily lead to a termination of rights or responsibilities with regard to one government or another. The right to create the citizens of Indian governments is a right that is an essential part of Indian government. This right can be accommodated in a federal system where many governments come into play. Such an act of accommodation is yet another part of the meaning of Indian government in practice.

## Citizenship and the *Indian Act*

With Bill C-31, Parliament in 1985 amended the *Indian Act* to alter the criteria it uses to determine who is and who is not an Indian and to increase the powers of band governments in relation to membership matters. As it did so, it confirmed that Canada continues to assert its ultimate right to determine who Indians are as well as the rights and benefits of aboriginal citizenship. The passage of the 1985 amendments to the *Indian Act*, the process by which these amendments have been implemented, and the response of Indian peoples and their governments indicates much about the meaning of Indian government in practice and the implications that fully recognized Indian government may have for determining who has the power to create citizens (Cassidy, 1988b).

Seen in this light, Bill C-31 and its implementation provides an informative case study. Despite the many questions raised by the 1985 amendments to the *Indian Act*, the response of band governments and Indian people indicates that the matter of aboriginal citizenship may be much more resolvable in practice than it has been in principle. Indians have moved to take the powers that they have been granted, however limited. As they have done so, they have not, with very few exceptions, raised questions about their continued Canadian citizenship. Rather they have, for the most part, taken this as a matter to be assumed, and they have forged ahead to seek definitions of the benefits of Canadian citizenship for aboriginal peoples in terms of access to services and special rights. Meanwhile, they have moved to provide a substantial basis for citizenship in their own governments as they have drafted what the federal government has defined as "membership codes." Acceptance of Canadian citizenship and its benefits has not been seen, by Indian people in practice, as contrary to a full statement of self-government and citizenship in their own First Nations governments. Rather, Canadian citizenship has been assumed by most Indian people as a desirable and necessary part of Indian government and aboriginal citizenship in Canada.

The original impetus for the 1985 amendments was provided by the treatment of women that flowed from the provisions of the *Indian Act* at the time. In 1970 the Royal Commission on the Status of Women argued in its report that Section 12(1)(b) of the *Indian Act* should be amended so that an Indian woman could marry a non-Indian and maintain her status as an Indian as well as transmit that status to her children. A series of challenges to this aspect of the *Indian Act* was rejected by the courts, and promised changes by Parliament never came about. In 1981, the United Nations' Committee on Human Rights held that Canada was in violation of Article 27 of the International Covenant on Civil and Political Rights by denying an Indian woman her status and, thereby, her right to access to her native culture and language in her community. Still no changes to the *Indian Act* came about.

One of the many reasons why the *Indian Act* was not amended to exclude sexual discrimination against women was the attitude of many status Indians and their governments. Many status Indians deeply sympathized with the plight of those they saw as denied their identity as Indians, but they asserted other critical concerns (Six Nations Council, 1985). They questioned the whole idea of status and Canada's right to determine who is and who is not an Indian. Moreover, they were more than hesitant about any changes to the *Indian Act*, fearing that the few special concessions Canada had made to Indian peoples concerning financial benefits and access to government services might be eroded. They were opposed to the federal government becoming more involved in matters such as band membership. Indian peoples and their governments wanted to set their own agendas. They did not want the federal government to do so. And, perhaps most urgently, many Indian people were also concerned about the limited resources available to bands and how these resources might be stretched even further by the addition of a large and undefined number of new people to band lists without a corresponding increase in band funds.

The Blood Tribe Chief and Council (1985a) told a parliamentary committee in 1985:

> There is no doubt that 12(1)(b) created inequality. . . . The Blood Tribe does not dispute the concept of reinstating 'Indian' status. However the Federal Government must recognize certain facts. . . . The Blood Tribe's population is approximately 6,400. . . . This figure is expected to reach 10,000 by 1999. . . . Our seasonal unemployment rate averages between 75% and 80%. It has been obvious that the employment opportunities have failed to keep pace with the population increase thereby forcing off reserve migration. In addition, the rapidly increasing population has had a severe impact on the Blood Tribe's land base. . . . To further complicate matters, the Blood Tribe has a serious housing shortage. . . . These examples are merely the tip of the iceberg. There will also be a substantial increase in demand for even basic services such as public works, education, medical treatment, security, social assistance and child welfare. . . . The Blood Tribe . . . cannot accommodate a population influx.

Sexual discrimination, the Blood maintained, is "a European import." As such, it was "imposed" on the Band. "Now," the Blood argued, "you point your fingers at us. We suggest you clean up your own act . . . if the government wants to correct its century's worth of mistakes, it must pay the costs."

Pressure for changes in the relevant sections of the *Indian Act* continued throughout the early 1980s. In the *Constitution Act* of 1982 existing aboriginal and treaty rights were recognized and protected in Sections 25 and 35, but equality rights for and between the sexes were also entrenched in the Constitution. Section 15 of the Charter, which did not come into effect until April 17, 1985, to enable various governments to bring their policies and procedures into line, states that:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination. . . .

Section 28 states:

> Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally in male and female persons.

As Sam Stevens (1986) has pointed out, both of these sections of the Charter, but particularly Section 28, provide a "guarantee of sexual parity." This guarantee provided more impetus for those who sought changes in the *Indian Act*. So, too, did the work of the Penner Committee.

The Penner Committee was formed shortly after the *Constitution Act* was passed. A sub-committee of the main committee recommended, in a document separate from the major report, that all Indian governments should develop regulations and codes to exclude sexual discrimination and its effects from their practices. Just as significantly, in its final report in October 1983, the Penner Committee gave the question of membership a different dimension from the one that had dominated discussion to that point.

Echoing what Indian peoples and governments had been saying for years, Penner concluded that, "... it is the rightful jurisdiction of each Indian First Nation to determine its membership, according to its own particular criteria." Penner tied the self-government and the membership issues together, recommending that each First Nation be provided with the opportunity of selecting its own membership or citizenship code as a preface to determining its own form of government. Penner, following a suggestion by the Association of Iroquois and Allied Indians, also advocated that Parliament consider a "two-tier" approach to the matter. In this way, the federal government could use a general list as a means of providing Indian status to specific individuals for its particular purposes, and, at the same time, recognize the right of Indian governments to determine band membership.

Once the issues of membership in bands and legal status as an "Indian" in the eyes of the Canadian government had been joined within the context of the broader issue of Indian self-government, the federal government was able to act on the matter of changing the *Indian Act* with much more success. It could eliminate discriminatory aspects of its Indian policy, while restructuring the meaning of band membership and its relation to Indian status. Moreover, INAC could detach itself from many demands for services and funding at the community level by restricting its responsibilities to status Indians.

Parliament passed Bill C-31 on June 28, 1985. Because of the requirement that Section 15 of the *Constitution Act* would come into force on April 17, 1985, C-31 came into force on that earlier date. The bill amended the *Indian Act* in several ways (INAC, 1985). It terminated many of the discriminatory provisions of the Act, particularly those that affected women. It allowed for the reinstatement of many persons who were denied or had lost status as "Indians" in the past, and it enabled bands to define their own membership codes. Everyone currently registered as a status Indian would continue to be so registered . The bill also introduced other significant amendments into the *Indian Act* (INAC, 1987). The Act now enables band councils to exercise additional bylaw powers regarding residency rights and the prohibition or use of alcohol on reserve. The amount that bands may impose as a fine was increased from $100 to $1000. Significantly, the definition of a "child" was changed also, to provide for the band-based rights of children who are illegitimate, adopted by non-Indians, or adopted in accordance with Indian customs (Native Council of Canada, 1985).

From the federal government's perspective, Bill C-31 had an important effect on self-government. In INAC's estimation: "Bands can now exercise a greater degree of self-government than has heretofore been possible under the *Indian Act*" (INAC, 1986). Bands may adopt their own membership codes once they have followed a procedure involving appropriate notice of the intention to adopt a code, approval of the code by a majority of electors in the band, and notification of these actions to INAC. With the exception of those automatically reinstated to band membership as a result of the legislation and a few explicit requirements in the *Indian Act* concerning membership, the resulting band membership codes, rather than the *Indian Act*, are to be the basis for determining who may become and remain a band member. The Minister has no power to disallow a membership code or to approve or disapprove it. Once a code is adopted by a band, INAC no longer has any responsibility for maintaining a Band List for that band.

Bill C-31 created an important distinction between a person's status as a registered Indian and band membership (Cassidy, 1988d). There now may be "Indians" who have the right to both registered status and band membership. There may be others who have the right to be registered with INAC without band membership. And there may be still others who belong to bands without being registered with INAC. Some people who consider themselves, and may be considered otherwise, to be Indians still may not obtain either status or band membership, but this number has been sharply reduced (Native Council of Canada, 1986).

Bill C-31 restructured the nature of Indian citizenship. Indian people would now have two somewhat separate relationships to two somewhat separate governing entities: an individual relationship to the federal government and an individual relationship with bands and their governments. At the same time as Parliament had extended its special recognition of aboriginal peoples by making Indian status available to many more people than previously, it also had significantly severed itself from the matter of band membership (Cassidy, 1988b).

As Delia Opekokew (1986) has noted, "these *Indian Act* amendments provide for the greatest impact on the internal affairs of the majority of Indian communities since the major 1951 changes to the

*Indian Act*." By mid-1988, INAC had received more than 54,000 applications for Indian status, covering almost 98,000 individuals (INAC, 1988). Approximately 48 percent of these requests had been fully processed by Indian Affairs. Three quarters of these, involving over 35,000 new applicants, resulted in new registrations. INAC had revised its initial estimate of 65,000 applicants and was projecting an eventual total of almost 120,000, resulting in about 90,000 registrations (INAC, 1988).

The Bill C-31 implementation process was marked by controversy. The administration of the changes by INAC was characterized by many as uninformed, ineffective, and inefficient (Assembly of First Nations, 1987). Many bands were beset by internal disputes over the addition of large numbers of people into their communities. Questions were raised about the rights of nonresident band members to enjoy the full benefits of membership and, in some cases, to eventually establish residence on reserve. Many of those who were reinstated to membership as well as status as a result of the 1985 amendments indicated that they wanted to have access to the benefits due to status Indians while not necessarily returning and living as fully active members of their home communities (Cassidy, 1988b).

Before the bill was passed, INAC had said that the funding situation of bands would not be affected by its consequences (First Ministers Conference, 1985), but, afterward, many band councils contended that their already limited resources were being greatly strained (Assembly of First Nations, 1987b). As these councils had predicted, many bands were experiencing a shortage of housing and critical services. The situation raised questions about the meaning of Indian government in practice. The members of some bands began to ask if fuller Indian government might not mean increased autonomy as recognized First Nations' governments as much as it might mean being left by the Government of Canada with large responsibilities and declining funds for service delivery to the many Indian people who had been assimilated into the modern welfare state.

The Six Nations Council, for instance, had made its concerns over membership known well before Bill C-31 was passed (Six Nations, 1983; 1984). While holding that males and females should be treated equally and that marriage should not grant or remove status, Six Nations, in a presentation during the hearings on the legislation, argued that, "publicly explicit guarantees be made by the Government to provide compensatory resources on a per capita basis (lands, moneys), commensurate with the expanded band population by virtue of reinstatement or by virtue of membership within the Band List as determined by the Band's own criteria" (Six Nations, 1985). Based on its research, Six Nations estimated that its membership, the largest in Canada, could increase by 2,525, and that the band would need an additional 10,453.5 acres of reserve land and $3,857,671.75 in annual funding to support the new members. Where, it asked, would such funding and an increased land base come from? What, it queried, is the meaning of self-government, if bands do not have the funds to provide basic services?

Many other bands expressed similar views. Concerned about the impact on community life of "forced reinstatements," the Blood Tribe (1985b) articulated its wariness about the continued presence of enough resources to "have the political and economic means of maintaining ourselves as Bloods, of offering hope to our population for a reasonable standard of living, and of employment." The Blood, as the Six Nations and several other bands did, also had problems on political grounds with the changes brought about by Bill C-31. These Indian governments objected to the federal government proceeding to make further changes on the matter of membership while continuing to restrict Indian government in practice generally through the *Indian Act*.

In sum, Indian governments have had a mixed view of the 1985 changes to the *Indian Act*. The legislation provided bands with an opportunity to take more control over their membership (INAC, 1986). It did so in ways that were contradictory, and it did not offer full control, but it presented *Indian Act* band governments with the opportunity to move into a jurisdictional field that they had not previously occupied. Band governments took advantage of this opportunity. If these governments are to be recognized as First Nation governments, then they must have control over the creation of citizens in their governments. Constitutional recognition of such a right has yet to come about, so, in the pattern of Indian government in practice, Indian peoples and their governments proceeded to take what they could get out of the revised *Indian Act*. Once again, they decided to show Canada the meaning of Indian government in practice.

## Citizenship in First Nations

The negative impacts of Bill C-31 on the day-to-day processes of Indian governments have been a significant effect of the legislation. In the long run, its provisions concerning the matter of band membership may be just as significant for Indian government in practice. Much of this significance could be attached to the process of creating and administering band membership codes. The revised Act does not explicitly lay out the requirements for what a code may look like, but codes do have to include provisions for criteria for membership and for ceasing to be a member, membership application procedures, appeals procedures, guidelines for administration, and an amending process (Reynolds).

Many bands across Canada have adopted membership codes. Many others are in the process of doing so. Mirroring some of the basic characteristics of Indian government in practice, the membership codes many bands have developed over the past few years vary greatly in their provisions regarding matters such as the criteria for membership, the bodies responsible for screening members and hearing appeals, the role of elders, as well as relationships with other governments. In general, with some clear exceptions, they also tend to have certain key similarities in their emphasis on tradition, active citizenship, and open government.

The Cumberland House Cree Nation of Saskatchewan, for example, notes in the preamble to its code that the code is established to protect, exercise, and preserve its "inherent, aboriginal and treaty rights." In addition to recognizing criteria for membership established by the *Indian Act*, Cumberland House states that any applicant who may apply because he or she is a dependent of a parent on the Band List, or adopted by a band member, must be "of one-half Indian blood and a descendent of the Cumberland House Cree Nation." The Chief and Council are delegated the authority to appoint a Membership Committee to make recommendations concerning membership. Appeals are to be heard by a "Peacemaker Tribunal," consisting of three "elders" who will proceed in accordance with "the principles of fundamental justice." Applicants for membership may further appeal the decision of that body by requiring a special meeting of the membership where the majority of the electors present will make the final decision.

The Sechelt Band's code is much shorter than that of Cumberland House. The code of this British Columbia band does not have a preamble. Although it now operates under separate self-government legislation, Sechelt accepted the *Indian Act* amendments concerning membership and makes several references in its code to the Act as a basis for establishing criteria for membership. According to the code, a person is entitled to be entered in the Band List, "if 75% of the band electors who actually vote, vote in favour of his or her entitlement to be registered during a referendum of the Band, called for this purpose." If less than 75 percent and more than 50 percent vote positively, then a second meeting may take place. The appeal mechanism established by the code is in keeping with the Sechelt self-government pattern: the band is seeking to become an integrated and working part of the Canadian federal-provincial system. As a result, it explicitly recognizes the ultimate power of the federal court system in relation to membership matters. Although any decision of the band about new members "shall be final and binding," according to the code, an appeal is allowed to the Federal Court of Canada from decisions of the band council concerning eligibility.

The Sechelt and Cumberland House membership codes provide an interesting contrast. Cumberland House requires new members of the band to meet a "blood quantum" test; they must be one-half of Indian blood and a descendent of a member of the Cumberland House Cree Nation. Sechelt requires no such test. Sechelt requires new members to have the approval of 75 percent of the Band's electors who vote on a special referendum. Cumberland House delegates this power to the Chief and Council and provides for an appeal to elders. Sechelt says the electors' decision on individual applications will be final, but on the decision of the band council, appeal may be made to the federal court system of Canada. Cumberland House prefaces its code with a statement of its inherent, aboriginal, and treaty rights. Sechelt does not make mention of these matters, although it refers to the *Indian Act* several times.

The Sarcee Nation's Code provides yet another variation on the efforts of Indian governments to take more control over membership or citizenship matters. The code of this Alberta band is much longer than either Cumberland House or Sechelt's code, and is entitled the *Tsuu T'ina Citizenship Code*. Neither Sechelt nor Cumberland House make reference to citizenship; both refer only to members. The Tsuu T'ina Code begins with a "Recital":

> Under the guidance of the almighty God our Creator, we, the people of the Tsuu T'ina, to preserve our lands, sovereign, aboriginal and treaty rights, and to ensure continuation of the Tsuu T'ina, and to preserve our language, culture and tradition in continued relationship with the First Nations and Canada, do ordain and establish this Citizenship Code.

The references to sovereignty and culture are not echoed in the Cumberland House or Sechelt codes, although the former does provide for the involvement of elders and refers to inherent, aboriginal, and treaty rights.

The Sarcee use a fairly complicated blood quantum test for membership, requiring at least one-half Tsuu T'ina blood in most instances, three-quarters in others, and full blood in still others. They make no reference to the *Indian Act*, but generally accept the explicit provisions of Bill C-31 concerning reinstatement. In addition to meeting the general half-blood quantum requirement, the Sarcee set out different criteria for new members than do the Sechelt or Cumberland House. To the satisfaction of an "Evaluation Board" and a "Citizenship Tribunal," such persons must understand and speak the Tsuu T'ina spoken language; be knowledgeable of Tsuu T'ina history, customs, and traditions; be of good character; and "have a lifestyle which will be beneficial to the Tsuu T'ina." Upon meeting these requirements, candidates for membership must receive the approval of 75 percent plus one vote of the eligible electorate in one of two votes.

Candidates who feel that their qualifications are not justly recognized by the Evaluation Board and the Citizenship Tribunal may lodge an appeal with the Tsuu T'ina government, at which time the government must set a date for a vote. The person appealing must receive 75 percent plus one vote approval from the eligible electors at the vote, and must otherwise be eligible. If so, he or she is admitted to citizenship. Both the Tsuu T'ina Evaluation Board, which is the initial body an applicant must approach, and the Citizenship Tribunal, which is the appeal mechanism, are composed of an equal number of men and women, consisting of elders, full blood Tsuu T'ina and three-quarters blood Tsuu T'ina. There is no appeal from the process, as described, for gaining membership.

In addition to the differences described above, two further elements of the Sarcee or Tsuu T'ina Code stand out when it is compared to the other codes that have been examined. One has to do with the loss of membership: "Where a Tsuu T'ina citizen marries a non-Indian person, the Tsuu T'ina citizen shall lose his or her Tsuu T'ina Citizenship." The other concerns the collective rights of the Tsuu T'ina: they are to "supersede individual rights." From this and other aspects of the Sarcee Code, it can be seen that the Sarcee or Tsuu T'ina are strongly committed to retaining their culture as the foundation of their governing system, reducing influences that might be alien to it, and maintaining an active citizenry.

Band governments such as Cumberland House, the Sarcee, and Sechelt moved fairly quickly to put membership codes together once Bill C-31 was approved. So did many other bands across the country. A brief review of selected codes in British Columbia provides an insight into this process and what it reveals about citizenship in First Nations governments. The Squamish Nation's code, for example, indicates a concern for balancing and accommodating different interests with a system of public accountability, providing for a membership committee of three elders and four additional band members. The band members are chosen by the council. The method of selection of the elders is not explicitly stated, but it is presumably done by traditional methods. Silence on this aspect of governing citizenship is absent from many codes, possibly reflecting an unwillingness to provide any legitimate role for the federal government in the constitution of traditional governing structures, as codes are "permitted" under federally delegated authority.

Many British Columbia codes also recognize a strong and determinate role for traditional authorities in deciding citizenship questions (Cassidy, 1988b). The Fort Nelson Band, a Treaty #8 band in the northeastern part of the province, provides for appeals on applications to go before a panel comprised of elders and representatives from each traditional family group in the band. The Musqueam Band refers to a "Council of Elders" who will consider appeals. The Kispiox Band provides for an appeal to the "Council of Hereditary Chiefs," and declares its recognition that "the Hereditary High Chiefs of the Wolf, Frog, and Fireweed Clans are the persons who have the responsibility to maintain and enforce Gitksan laws."

British Columbia band membership codes provide for other interests besides traditional ones. The Ahousaht Band's code, for example, provides for a membership committee with representation of band members who live off as well as on reserve, thus giving nonresident band members a role in membership matters. The codes of many bands establish procedures for involving the entire membership in appeals. The Chemainus Band calls for the status of appeals to be determined by a majority of the electors, who cast a secret or open ballot at a band meeting. In these and other ways, bands have used the construction of their membership codes to provide for the further extension of their views of the structures of Indian government in practice.

For the most part, these band membership codes are very much citizenship codes. As such, they provide the basis for governing arrangements that reflect the traditional and inherent nature of Indian government. They also provide for the representation of many interests, and for checks and balances, as all democratic governments must. The provisions concerning the selection of membership in the codes of several British Columbia bands show this to be the case.

Most bands in Canada will eventually take advantage of the 1985 revisions to the *Indian Act* to formulate membership codes and expand their control over the matter of membership, but most bands have made it clear that they do not take the new powers they have received as a basis for a full exeroise of Indian government over citizenship matters. (Assembly of First Nations, 1987b). The powers provided through Bill C-31 are still delegated powers. This delegation of jurisdiction follows the same pattern as delegated jurisdiction does generally. Citing "the principle of delegated jurisdiction," Vina Starr, for example, has pointed out that according to this principle, "all the new rules [illegible] be 'intra vires' the *Indian Act*. In other words, the rules must stay within the purpose or objective of the delegating Act." Starr points out that, as a result, any band membership rule which attempts to deny membership for a variety of reasons may "be struck down by the courts as inconsistent and 'ultra vires' the *Indian Act*." These are not the only restrictions or limitations band governments face as they establish or administer membership codes based on delegated authority.

The changes to the *Indian Act* brought about by the 1985 amendments involve many limitations on the political choice of Indian governments. The United Native Nations maintains that, "INAC continues to control the definition of Indian and continues to divide our people into categories: those with status and band membership rights; those with status only; those with membership in a band only; and those not entitled to either" (C-31 Implementation Poor). The legislation also limits a band's ability to control matters relating to the rights of band members. Section 1 of the bill, for instance, amends the definition of "elector" so that the age requirement is eighteen and not twenty-one years. Section 10 details the form membership rules must take, requires consent to the code of a majority of the members over eighteen years, and restricts bands from taking away the acquired rights of existing band members or of those who are eligible to have their band membership restored. These may be reasonable requirements, but they are not the result of the decisions of Indian governments. They have been imposed on these governments.

The Assembly of First Nations (1985) argues that the revised *Indian Act* gives the "Indian Registrar," an official of INAC, a continuing power to add names to a Band's list in accordance with his interpretation of the Band's rules. The legislation also lays out procedures whereby protests regarding personal membership matters by individuals may be made to and decided upon by the registrar and, if necessary, the federal courts. Considering these and other restrictions concerning membership which are now part of the *Indian Act* as a result of Bill C-31, the Blood Tribe, for instance, argues that the bill infringes upon its "inherent right to determine the citizenship of our people." In reality, the Blood maintain, the bill "only allocates administrative maintenance of Band Lists to the Band."

Not everyone agrees with this assessment of the changes in band powers concerning membership. Delia Opekokew (1986), for example, argues that these changes "allow for great creativity." The powers given to Indian governments, she attests, may be "a first recognition by Parliament" of the right of Indian nations to "self-determination." Self-identification by a people, Opekokew maintains, is a critical foundation for cultural preservation and full self-government. The power to determine the nature of and requirements for citizenship, she suggests, is also a necessary aspect of the effective exercise of power at the community level by community members.

The different assessments of the implications of Bill C-31 for Indian peoples across Canada mirror the complexity of Indian government in practice. As passed by the Parliament of Canada, Bill C-31 was a reflection of federal authority over band government. As such it could be and is perceived as a denial of inherent jurisdiction on the part of Indian governments over citizenship matters. Nevertheless, Bill C-31 provided band governments with much greater control over their membership than before. It also provided an insight into the federal government's emerging policy regarding Indian government. To an extent the ability of Indian governments to deal with their own matters of governance is enhanced. On the other hand, such enhancement takes place within a framework that ultimately denies Indian government, in practice, in all but very limited ways. To add to the complexity of the situation, this complicated development has taken place within a context characterized by government financial restraint, which limits resources for expanding band populations.

Taken as a whole, the changes brought about by Bill C-31 can be seen as both threatening and, at the same time, accommodating to Indian government in practice. With regard to the general issue of citizenship and the themes touched upon earlier in this chapter, the experience in the wake of the 1985 amendments to the *Indian Act* shows that citizenship in fully empowered aboriginal governments may not be as contrary to Canadian citizenship as scholars such as Noel Lyon, Roger Gibbins, and Rick Ponting might assert. To the contrary, these two forms of citizenship may be fully compatible, if each is fully recognized and suitable accommodations between them are made. If this is to be the case, then Indian people will have to play a much more decisive role in making further changes to the Canadian political order, at both the constitutional and legislative levels. Otherwise, what is called self-government by some governments, and by the federal government in particular, may be justly seen as no more than assimilation and termination under another guise.

# 4

# Policy-Making

Governments help meet important needs through land use planning, peacekeeping, sewage treatment, animal protection, libraries, museums, parks, road construction, and fire prevention and protection. Governments may also be used for regulating liquor sales and the labour market; coordinating housing construction and management; business licensing; and managing communication services. Many of these services are provided by local governments. Important services such as health, education, economic and social development, resource management, and cultural enrichment also are provided by governments, sometimes of the local variety and other times at the provincial or national levels. All of these services and more may be provided through governments. Any one of them can be provided by people in ways that do not include governments, but usually governments will be involved in undertaking such tasks in one way or another. How and to what extent depends upon the preferences of their citizens and the policies governments make.

Selecting and managing governments and their policies is a complicated process. Indian governments, for their size, are even more complex, and their policies and administration more difficult than most other governments in Canada because they have such a wide variety of functions. Normally, school boards and other educational authorities will take care of education. Hospital and other health authorities will focus on the provision of health services. Provincial governments will serve for some purposes; the federal government for others, and local and regional governments for still others.

Frequently, Indian governments, acting as local or regional governments, will provide services for many of these purposes. Many tribal and band councils are responsible for a much wider and more complicated array of governing functions than other comparable Canadian governments are. A single Indian government, or a set of closely aligned Indian governments, with overlapping personnel at both the elective and administrative levels, may provide municipal services as well as health, education, economic, and social development programs. Such services and programs are usually produced by a range of relatively discrete municipal, federal, and provincial governments. Cultural dynamics make the task of selecting and managing Indian governments and their policies even more intricate.

## The Institutions of Indian Government

The movement toward self-government, the Penner Committee argued, must begin with the band. In some instances, the Committee allowed, bands would "look to their original nation to constitute the primary political unit," effectively amalgamating with other bands. In others, a band might separate into two or more units, but the starting unit would be the band itself. The committee's emphasis on bands was an important part of its view of Indian government.

Band government is first and foremost band council government, government by a group of members who have been chosen in one way or another by the general membership in their communities. Two or more band councils often federate into tribal councils in order to accomplish a broad range of political and administrative objectives, but usually such groupings are assumed to operate only in terms of the needs and wishes of the bands that form them.

Band councils and tribal councils are, in most cases, the critical institutions of Indian government. They are not the only institutions, however. Indian people are increasingly forming a large array of boards, societies, and commissions to accomplish governing tasks. They also rely on traditional structures of authority. As they rely on all of these forms of governance, they seek to find the political and administrative means of obtaining a fuller measure of self-government, and they usually use band councils as a focus of activity. Such a focus must be understood in the context of the political order in Indian communities and on Indian land.

Traditionally, as noted in Chapter 1, Indian peoples have had their own forms and patterns of governance. The Gitksan people of northwestern British Columbia, for example, are customarily governed by "houses" and clans in which hereditary chiefs are responsible for serving the needs of their members (Clark and Cove; Harris). The Gitksan, like other Indian peoples, have a strong traditional legal order and customary ways for managing resources and other public goods that are well established and were fully functioning before contact with Europeans. They have governed their territories "from mountain to mountain" since time immemorial (Cassidy, M., 1984). The Gitksan way of making decisions about political matters is highly organized and, for their purposes, effective as well as appropriate.

The Gitksan are not unique. The Blood Tribe, Saddle Lake Band, the Dakota Ojibway, the Mohawk, and other Indian peoples across Canada all have traditional political and governance systems. Often these systems clash with or remain somewhat separate from the systems of governance that have been imposed by and came along with non-Indian peoples in Canada. Sometimes they merge to a significant degree. The contributions of and struggles between the traditional and contemporary dimensions of governmental decision-making in Indian communities are reflected in the ways in which tribal and band councils are selected and how the citizens of Indian governments use them to express their preferences about political matters and to make policies. In many cases, the operations of band and tribal councils cannot be understood apart from the dynamics of traditional Indian government.

Many Indian people would agree with the leaders of the Band Council of the Mohawks of Kahnawake when they say that "band council government is a living contradiction." Band and tribal councils are often caught between two cultures, Indian and non-Indian, as well as between their communities and the demands of the world around them. In such a context, Indian government is no easy task. In many ways, it is, as Chief Joe Norton of Kahnawake says, a process of "reverse acculturation." As Chief Norton notes, Indian government, for many Indian people, is a dynamic that means "unlearning" many things, such as relying on governments to make decisions people can make for themselves and learning about old ways of doing things, such as seeking consensus rather than crystallizing differences in political decision-making situations.

Band council governments are often the focus for such a process because they are firmly rooted in many Indian communities. Band council government was first formally adopted in 1869 by the Government of Canada, but the Walpole Island Band had already operated under this system for four years (Taylor, 1984b). Today, as Dean Jacobs, Research Director of the Band's research centre, Nin Da Waab Jig, notes, many Islanders "consider the elective system to be their modern tradition or tribal custom" (Van Wyck). Nevertheless, Walpole Island still uses consensus and other forms of traditional decision-making as it governs its own affairs. Other peoples, such as the Carrier Sekani of north central British Columbia, use band council government for one set of functions, such as village development and management, and more traditional governing institutions for others, such as the pursuit of comprehensive land claims (Cassidy, F., 1988c). Sometimes Indian peoples even seek to merge the two systems of governance, as in the efforts of the

Gitksan-Wet'suwet'en peoples to manage the fisheries in traditional ways by using the mechanism of Indian Act band bylaws to bring traditional authority to bear on the control of this resource (Gitksan-Wet'suwet'en Tribal Council).

This intricate weaving and blending of traditional and contemporary forms characterizes Indian government as an emerging phenomenon. So, too, does the extensive range of tasks for which Indian governments are responsible. The result is that Indian people and their governments face many practical challenges as they undertake tasks such as selecting leaders, choosing policies, and managing their internal and external affairs. These challenges are most frequently experienced in their sharpest form at the community level, as band councils are chosen and as the councils select policies and guide the administration of efforts to realize these policies. Indian government may be and often is traditional at its roots and in its operations, but band council government, whether it be seen as traditional, imposed, or just pragmatic, is where many of the tasks of government are addressed by Indian peoples in Indian communities.

Band council government takes many forms. Prior to 1964, the Blood Tribe of Alberta was governed by a Chief and Council who served life-long terms. The leadership of the Tribe was selected from the Fisheater Clan, the grouping that by tradition supplies political leadership. In the mid-sixties, this method of selecting Council members was replaced by an elected band council system as outlined in Sections 74 to 78 of the Indian Act. In 1976 the Blood held a referendum, and they returned to an electoral system of "Tribal Custom." Elections take place every two years, and an appeal system designed by the Blood for their specific purposes has been developed. Chiefs are still from the Fisheater Clan, however, as they have been for over 140 years. Indian communities across Canada use a variety of mixtures to choose those who will govern as their representatives on band councils. The traditional and the Indian Act methods of choosing leaders may be divergent in their principles and operation, but they are often intertwined in a complicated and evolutionary manner as band council government functions in a particular community setting.

This is not the case in every community. In many communities, as in Walpole Island, the system of electing band councils according to the Indian Act has entirely replaced the customary system of choosing governments (Taylor, 1984b). In others, the traditional system remains a functioning governing system in one form or another. Many bands have a hereditary system that stands side-by-side with the Indian Act system. The two systems may be integrated by the community, as in the case of the Blood, or they may stand apart and, to some degree, in opposition. This is the case with the Haudenosaunee Confederacy and several Iroquois Bands, for example.

The peoples of the Haudenosaunee Confederacy provide a good example of a people who maintain a hereditary leadership in governing institutions that are distinct from the band council system (Johnston). At Kahnawake, the Mohawk traditionalists say that the only true government is the government the Creator gave the Six Nations of the Haudenosaunee Confederacy, when He gave them the Covenant Circle Wampum. Inside of the circle of the fifty traditional chiefs, they say, "...is our people and our future generations in security, peace and happiness. Inside of the Circle is our language and culture, our clans and the ways we organize ourselves socially, our laws and the ways we organize ourselves politically" (Haudenosaunee). Those who "go outside the Circle leave behind the clans, laws, ceremonies, ways and traditions of the Haudenosaunee" (Haudenosaunee). The Haudenosaunee historically have had "serious problems" with the band council system of selecting leaders and governing. Women, for example, have a very important political role in their society. When the Indian Act system was first introduced, women were not allowed to vote for or be on the Council. This was later changed, but the Haudenosaunee still object to the elective system. "By virtue of 'one-time' elections," they argue, "individuals were vested with the authority to make decisions without the participation of the people and the clans." As importantly, they see this system as requiring "fixed, contentious, and competitive elections, contrary to the method of building toward consensus." The elective band system, they maintain, was imposed by the Canadian government by sheer force of arms: "In one particular community, Akwesasne, in 1899, the forced imposition of the band council by the Canadian government, with the assistance of the Dominion police, resulted in the killing of one of the traditional chiefs and the jailing of several others of the traditional council." By 1934, band councils were installed in all Haudenosaunee communities. They have never been fully accepted (Haudenosaunee).

Despite their lack of full acceptance in some communities, band councils have important, if limited, powers, and the methods by which they are selected are a critical part of policy-making in Indian governments. In one form or another, many band councils are selected by methods that are laid out in the Indian Act. Unless otherwise ordered by the Minister of INAC, the council of a band, according to Section 74 of the Act, consists of one chief and one councillor for every one hundred members of the band, although the number of councillors cannot be less than two nor more than twelve. An exception is made for a "council chosen according to the custom of the band." A system can be recognized as a custom of the band without being the traditional system used by the band for choosing leaders, although it often is. Bands accept, for one reason or another, the procedures for electing councils that are laid out in the Indian Act, often with slight variations. Goodfish Lake in Alberta, for instance, elects its councillors for a period of three, rather than two, years. Other bands select more councillors than the Act prescribes. Still others use traditional methods based on clans and the authority of hereditary chiefs.

Variations in the selection of elected leaders are just an example of the diversity of Indian government in practice. Indian government is based upon evolving institutions of governance. Some of these institutions are traditional in origin. Some, like the band council, are more contemporary. Some are a mixture. Diversity, not uniformity, is the pattern, nevertheless. Governing institutions in Indian communities, as in any other community or territory, must be organized. They must respond to citizen preferences and engage in policy-making. As they do so, they will follow certain decision-making patterns. Despite their diversity, many Indian governments are characterized by relative consistency in relation to such patterns.

## Decision-Making Patterns

At the community level, the most important decision-making strategies Indian governments use include reliance on consensus decision-making; elders and others knowledgeable of traditional ways; and public meetings. The use of these strategies is often based on a perspective similar to that adopted by the Alexander Band Council, of Alberta, on education and other community matters:

> No one set pattern or blueprint exists. Actual change in an actual reserve situation means dealing with the actual constraints of that reserve. Only when action begins do the real learnings take place. Every locale has its own starting place. To effectively make educational improvement you must start with where the people are, what they are feeling about their needs and go from there (Alexander Band Enterprises).

Traditionally, most Indian communities are governed by laws and institutions that place much emphasis on direct citizen involvement in political decision-making. This is an integral aspect of the political culture of Indian government. Usually, one or more chiefs are expected to provide leadership in policy-making, but this leadership is regularly supported, guided, and held accountable through an array of community practices, many of which require active participation of adult tribal members. These practices are often rooted in the traditional basis of Indian government.

Customary Mohawk decision-making concerning political, economic, and social affairs, for instance, takes place within the context of three clans: the Turtle, Bear, and Wolf. Issues of common concern are "thrown into the well from which everyone will drink." When issues need to be decided at the tribal or national level, one of the clans acts as "firekeepers," or judges, and the other two discuss the issues. As each clan finishes the discussion, it throws the matter "across the fire" so that the other clan may have an opportunity. Meetings go on until a consensus is reached. Consensus is always reached before a policy decision can be finalized (Haudenosaunee).

As compared to other governments in Canada, Indian governments make a striking use of consensus decision-making. Groups reach a consensus when they arrive at a general agreement based on a process of thinking and talking together. For consensus methods to work, members must share such common values as cooperation, commitment to other members, and tolerance of differing ideas. The time must be taken to provide for a thorough discussion, and opposing opinions must be stated. All members must agree with the decision and be prepared to follow up as it is implemented.

Often the entire membership of a band is involved or encouraged to be involved in decision-making. The Katzie Band in British Columbia, for example, makes extensive use of general band meetings as well as referenda to fully stimulate discussion and arrive at important decisions. Meetings of the full band membership are held approximately six times yearly. When key matters are at stake, concurrence of band members on their nature is almost always reached before voting takes place. Voting, whether in a general meeting, on a referendum, or for the purposes of passing a Band Council resolution, most often serves only to formalize what the community has already decided through discussion and debate.

Similar decision-making patterns predominate at the tribal as well as the band council levels. The Dakota Ojibway Tribal Council in Manitoba provides a good example of an Indian government that relies on consensus decision-making. As an incorporated body in the Province of Manitoba, the Council has the voting procedures for its decisions outlined in its Constitution. Full consensus is not required. In practice, the Council proceeds, whenever possible, by consensus.

The constitution of the Nuu-chah-nulth Tribal Council in British Columbia also outlines voting procedures that do not require consensus. Based on population, each community has from three to eleven votes on the Council. In practice, each community is represented by its elected chief, although meetings are generally open to all. The chiefs seek to present a sense of their communities and achieve consensus among themselves. Only when such consensus cannot be reached does the Council reconstitute itself in terms of its formal membership to take a vote. This happens rarely.

The search for consensus does not mean that there are never firm, deep, or prolonged differences in Indian communities. For instance, the original movement toward contemporary self-government at Walpole Island in Ontario in the mid-1960s was marked by conflict and dissension within the community. Nevertheless, the final decision was made only when consensus had been reached (Taylor, 1984b). Today, the Walpole Island Council proceeds by majority consensus. At Walpole Island, all routine, noncontentious decisions are made by the Chief and Council, but there is a high degree of political participation by citizens in governmental decision-making. At band council meetings, as long as opposition to a decision is stated, a motion is not normally made from the floor. The power of the Chief to vote on issues and break a tie is very rarely used.

The Walpole Island Band Council also makes frequent use of nonbinding plebiscites and binding referenda. Members of the band serve on Council committees as volunteers, though they are paid token honoraria. It is often at the committee level where alternative plans of action are sought, research and analysis is conducted, debate takes place, and recommendations for Council's attention are formulated. For example, in 1984 and 1985, the band's housing committee developed a housing policy and a set of criteria for approving applications for band-supported construction which were eventually adopted by the Council.

Citizen participation is also an integral component of the Squamish Band's approach to housing, as it is with many bands. As part of its responsibilities, in the 1970s the Squamish Band's housing committee established criteria for band-subsidized housing, requiring applicants to be two-parent families. For many band members this was not acceptable. Between 1970 and 1980, approximately 45 percent of the children born to resident members of this British Columbia band were born to women who were not married, many of whom refrained from marrying because a man without status under the

Indian Act was involved, and, if married to a non-Indian, a woman would lose her Indian Act status and all the benefits flowing from it. The housing policy was raised at two general meetings of the band. The outcome was the establishment of a Band Housing Authority with five members elected from each of the several communities that make up the band. These members were charged with representing the interests of a full range of families, including single parent families. As a committee, they had the power to advise the Council on the allocation of all housing funds.

These developments took place within the context of the Squamish Band's general reliance on regular and active citizen involvement in decision-making. General meetings, open to all community members, take place between one and ten times a year, and are attended by 150 to 400 members. These meetings may be called by the Council or band administration, or they may be initiated by band members, with a petition signed by a minimum of twenty members. If a quorum (defined as 50 percent plus one of the band members) does not occur, a motion passed at one meeting must be voted on again and ratified at a subsequent general meeting, not more than two weeks after the first meeting. Decisions made at these meetings become band law: the Band Council must adhere to the outcomes of these meetings. It was as the result of such a process that the Band Housing Authority was established.

Many bands combine regular council meetings with full membership meetings. The Pas Band Council in Manitoba, for instance, meets on a weekly basis. These meetings are open to the public. Until mid-1986, a "Citizen's Period," where individual band members could state their concerns, was included. General community meetings were held every three months to encourage community-wide participation. Since that time, the "Citizen's Periods" have been eliminated from regular meetings, but community meetings have been increased from four to twelve meetings yearly.

Traditional decision-making patterns in Indian communities were disrupted by the events following contact with European nations. A recognition of this fact has led many Indian communities to stress traditional ways and active citizen participation in governance matters as the basis for self-government.

Indian peoples in general place a much larger emphasis on the wisdom of elders as a practical guide for governance than other Canadian governments do. The Shuswap people of British Columbia, for example, point to the traditionally important leadership role elders have played in their practice of government:

In council, their voices were listened to carefully and their expert skills were relied upon to help in making critical decisions and to help in training the young. They continually shared the knowledge of the Shuswap people throughout the ages in the stories they told and related to their large extended families or whole bands during the long winter evenings or around the fires at group gatherings. They were highly respected and well cared-for as they aged (Matthew).

The Shuswap are considering the formation of an Elders Senate based on a network of elders committees in its bands. The Blood Tribe is also looking for its Elders Council to operate more or less as a senate in the future. Many other Indian governments are following a similar course.

More and more frequently, and on the Prairies in particular, Indian governments have established a "Council of Elders" to provide advice and guidance in decision-making. The Blood Tribe Council of Elders provides this Alberta band with historical background, formulates referenda questions, and is generally available for consultation. The Pas Band also has a Council of Elders; this Council, established in 1982, is appointed by the Chief and Band Council and composed of four or five elders, most of whom have been on the Band Council at some point. Although the Council of Elders does not have voting power, it is influential. If, for example, it has a complaint, or if it takes a position that is contrary to that of the Band Council, a full investigation is conducted before further progress is made on the matter.

The Dakota Ojibway Tribal Council also draws on the wisdom of an active Council of Elders, as well as a Council of Women and a Council of Youth. The Tribal Council sees these means of citizen participation as critical, because in its view, women provide "the back-bone" of the Dakota and Ojibway nations, the youth are their future, and the elders represent the authority and wisdom of the past.

Strong citizen participation, whether it be from specific groupings such as elders, women or youth, or from the general populace, is an important feature of Indian government in practice. As the authors of *Wabung*, a landmark statement of the Manitoba Indian Brotherhood (MIB) on Indian government in the early 1970s, noted:

> A century of government administration and government and church control . . . [and the] effects of living in an atmosphere of state dependency, where virtually all decisions relating to your life and your future are made by others . . . will require . . . developing new methods of response and community involvement.

This perspective led the MIB to the conclusion that "a whole new process of community orientation and development" is necessary if Indian communities are to govern themselves in the light of the preferences of their citizens.

In 1971 the MIB advocated the view, which many Indian organizations and governments would advocate throughout the 1970s and 1980s, that political change should be based mainly on voluntary activity at the community level and should be focused on a broad range of citizen-driven organizations, including municipal governments, school boards, community clubs, and recreation associations. "Only in this way," the MIB asserted, "would there be a transition from paternalism to community control."

Indian governments use many strategies to achieve such goals. Some involve the organization of band and tribal councils. Others are at the intergovernmental level and involve the use of coordinating committees for programs and services. While many issues are easily understood by band members, and thus are appropriate for discussion in unstructured forums, other issues may require a council to organize major citizen participation efforts to provide for the education of band members before important decisions can be made. Two examples of the approach are illustrated by the Shuswap Tribal Council and Blood Tribe.

The Shuswap Nation Tribal Council was started in 1981 by six of the seventeen Shuswap bands. Several others eventually joined. Work towards a common approach to Indian government among the Shuswap bands began soon after the Tribal Council's inception. The members of the Tribal Council realized they could not speak with one voice on self-government when they were in the process of preparing a brief for the Penner Committee. The Tribal Council concluded that a major stumbling block was that community members were not familiar with the issues and consensus had not been reached on the appropriate responses to them. As a consequence, the Shuswap Task Force was struck in 1983 to explore issues surrounding self-government in a more systematic way. In particular, the Chiefs of the Shuswap directed the task force to solicit directions from the Shuswap people on a new financial relationship between the Shuswap and Canada, the future relationships between the Shuswap bands, and the implications of the new Canadian Constitution (Shuswap Nation Tribal Council, 1985b).

After background research was undertaken, the task force held workshops in several communities to inform members of the issues. "Evidence hearings" were then held as a method of obtaining community direction and input. By April 1984, these hearings were concluded, and by June 1984, every household had received a copy of the task force's *Report of the Shuswap People to the Shuswap Nation Tribal Council.* In March 1985, a Special Assembly on Shuswap Land Title and Shuswap Unity was convened. At this meeting, the *Shuswap Political Accord* was reached and the task force's mandate was extended (Shuswap Nation Tribal Council, 1985a). In its subsequent work, the task force developed alternative models of self-government for the consideration of the Shuswap Nation.

The Blood Tribe in Alberta provides another example of this frequent practice. The Blood Tribe's reserves occupy a total of 510 square miles in southwestern Alberta. Consisting of foothills, grasslands, prairie buttes, and farmland, these lands comprise the largest total reserve base of any band in Canada. The Blood community is divided between those with access and those without access to the land. In the past, this has been a divisive issue. Those in possession of traditional land-use privileges lease out land, often to non-natives, and receive all the revenue. In 1986 and 1987, the band's land department undertook a large citizen participation project to address the land issue.

As designed, the Blood Tribe's community consultation project had four phases. Phase 1, based on personal interviews with each household, was aimed at collecting information and identifying views on how land-use problems might be addressed. In Phase 2 meetings based on family formations were held. Historically, the Blood Tribe was known as the Tribe of Many Chiefs. The views of these chiefs and their families provided the focus for this phase. In Phase 3 meetings of various districts on the Blood reserves were held. Area representatives collected information pertaining to land disputes, prior council decisions affecting each area, and possible solutions to current problems. In Phase 4 full band meetings were held to discuss and resolve the pertinent issues. The band determined that its ultimate goal was to ensure there is an equal distribution among band members of wealth generated by the land.

Political decision-making processes similar to those used by the Shuswap and Blood Tribes are used by many Indian governments. This kind of citizen participation in government policy-making has been used, for instance, by bands across the country to address the challenges of developing a membership code. Such an approach is but one example of how the citizens of Indian governments interact with each other and their governments, as well as how these governments organize themselves. The active encouragement of decision-making processes that foster opportunities for the clear statement of citizen preferences is a basic component of the political culture surrounding Indian government in practice.

## Organizing for Policy-Making

Indian governments rely on various organizational approaches to policy-making in addition to citizen participation. Once the members of band councils are selected, for example, they must decide how to organize themselves, how to make political decisions, and how to translate these decisions into administrative practice. This is the most fundamental step in organizing for policy-making within these institutions. Most band governments use a portfolio-committee system to organize the management of their affairs under their elected leaders. Council members are assigned portfolios which include the responsibility for the facilitation of policy formation and administration in relation to specific band functions. To help and guide them in their portfolio work, they are also required to work with committees. This system, of course, varies from band to band, often depending on the size of a band and its own political culture.

Usually, the organizing process starts with the division of portfolios among councillors. At the time information was collected for this study, the Goodfish Lake Band in Alberta, for example, maintained its Chief and Council as full-time employees of the band. The Chief was responsible for social services, education, and economic development, as well as for facilitating the participation of elders in band business and maintaining active involvement in self-government issues on the national level. One councillor was responsible for housing, band buildings, and related services. Another was responsible for agriculture (the band's major economic endeavour) and vehicle services. The third councillor was responsible for recreation, policing, roads, and "special projects."

Bands with more councillors are able to assign fewer portfolios to each, providing a greater opportunity for councillors to become experts in a service area. The portfolio system enables Indian governments to create a division of labour as far as policy-making at the council level is concerned. It is also an approach to a difficult problem for all elected governments: the organization of the political and administrative dimensions of the policy-making process at the elected level. Ideally, elected leaders make the large decisions — the policy decisions — of a government. Appointed employees make the day-to-day decisions — the administrative decisions; they decide how to do what they have been directed to do by the elected representatives. Together the activities of appointed and elected officials, with more general citizen participation, form the policy-making process, with direction for administrators predominantly from the elected officials. In reality, however, administrators frequently have extensive experience or expertise in their areas of operation, while elected councillors may have no or little expertise. In those and other circumstances, the portfolio system holds out the promise of enabling council members to retain greater control over the direction of day-to-day government.

The Katzie Band, just as many Indian governments do, uses the portfolio system for these purposes. Shortly after the band elects its Chief and Council, each councillor is assigned to a specific portfolio of duties. If not well-versed in their assigned areas, Council members are required to seek out and undertake training that will help build the necessary knowledge and skills. Each Council member is responsible for chairing all meetings of committees constituted under his or her portfolio(s) and for regularly apprising Council of committee and other relevant activities. Because the administrative arm of the Katzie Band government is small, councillors not only make policy and oversee the activities of band employees, but also they are quite active in day-to-day administration and program delivery. This would almost certainly not be the case in larger Indian governments.

The Katzie government organizes its affairs into the following portfolios: economic development, band affairs, housing, social development, education, and a "political" portfolio. The requirements of each portfolio are extensive. In addition to organizing and chairing a committee of community members for the purpose of monitoring all Katzie band business, the member who holds the economic development portfolio, for instance, is responsible for:

- serving as consultant to the Katzie Band on all economic matters;
- acting as an advisor for Katzie Band members wishing to set up individual businesses;
- planning for the band's future economic opportunities by becoming familiar with funding sources, external economic development agencies, and growth areas that might have an impact on the band;
- reviewing all band financial statements and reporting to council on related matters; and

- acting as advisor and link to the Band Council for the band's development planner.

The other portfolios are equally demanding.

The extensive nature of the responsibilities members of band councils have reflects the complexity of Indian government at the community level. Typically, business handled within the context of band council meetings covers virtually all matters of concern to band membership. While official action on some issues is limited due to restrictions contained in the *Indian Act*, both the range and volume of policy, administrative, and financial matters dealt with by band council governments is expanding enormously as a consequence of widening jurisdiction-in-practice and the assertion by bands of inherent powers that may or may not be recognized in the *Indian Act* or other federal or provincial legislation.

Elected representatives need assistance if they are to fulfil their policy-making roles properly. In addition to assigning portfolios, most Indian governments rely on a more or less extensive structure of committees to support policy-making processes and link the political with the administrative aspects of decision-making. The Katzie Band in British Columbia, for example, has, for each portfolio, standing committees which are chaired by the Council members who hold the portfolios relevant to these committees. It also has *ad hoc* committees such as its hiring and grievance committees. Positions on all of these committees are held by interested members from the community at large, although efforts are made to ensure representation from each of the band's three inhabited reserves. The size of each committee fluctuates between two to five members. The role also varies. Some committees are "working committees" which undertake band business. Others are more like advisory committees to the Council.

Band Council members do not always take the lead in organizing or directing committees. In many bands, citizen-based committees take on a governing power of their own; sometimes, as in Kahnawake, this power is seen and observed by the Council as a primary and higher power. In such cases, Council members sit on committees but do not chair them, acting as a link between council and its committees instead. This also happens in the more frequent instances where committees are seen as part of a more Council centred policy-making process. Still, committees take many forms. In the Kamloops Band government structure, for example, administrative staff normally form a large part of the membership of this British Columbia band's committees. In other communities, such as Goodfish Lake, members of the band are appointed or elected to serve on committees.

More and more frequently, Indian governments organize special committees or "councils," which draw upon specific groupings in their communities such as elders, youth, and women. As Ed John, the former Tribal Chief of the Carrier-Sekani Tribal Council in central British Columbia, has commented:

> Any planning for future development must take place in our communities involving our Elders, our Youth and our elected and hereditary leadership ... The problems and needs are discussed by the community members and the community members come up with the solution best suited to their needs and requirements. Any plan developed that does not have community input, discussion and decision will be meaningless.... Our Elders... have brought us to where we are. We must learn, understand and utilize their knowledge, wisdom and teachings (Carrier Sekani Tribal Council, 1987a).

Community-based committees that work with elected Indian governments have had a particularly important influence on the evolution of Indian government in practice. Often such committees are organized by community members as a reaction to a particular need or situation, and only after substantial development do they become formal committees of band councils.

The Mohawks of Kahnawake are one instance of an Indian community that has used citizen-based committees extensively to achieve more self-government. The dynamic between the community as organized into committees and the Council in Kahnawake is a good instance of how government actually takes place in many Indian communities today. As provisions in a particular service or program area grow and develop, committees are granted—or take—more governing authority from the Kahnawake Council. Eventually, they function as semi-autonomous units. This process and approach, the Mohawk leaders believe, allows services, such as health, education, and justice, to be governed in a professional and community-based way with a minimum of "political" interference. That is, it minimizes interference—from members of Council and those seeking membership on Council—which might be rooted in desires to gain and hold political office more than to benefit the community.

The Mohawk Council of Kahnawake has, in their own words, "demanded" and received program responsibility in governing areas such as education, health, social services and welfare, policing, and economic development. Over the past many years, the community has had particular problems with the educational provisions available within it. Dissatisfaction among the parents of school children ultimately led to the formation of a School Committee by the parents themselves. Over time, this committee has been an important pressure group, spurring some major changes in the Kahnawake education system. In 1967, it was able to achieve the unification of the two Catholic and Protestant school systems in the community. Using a variety of tactics, including marches and sit-ins, the committee also led a successful fight to have a new high school created in Kahnawake. Currently, the education committee, consisting of twelve members, advises the band and its administrative arm for education, the Education Centre, on all educational matters. The committee still exercises a fair amount of initiative and independence.

Other band governments use the committee system in ways different from those used by the Mohawk of Kahnawake. Most tie committees to the portfolio system in one way or another, so that the members of band councils can draw on committees for information and support as they make and guide the implementation of policy. The portfolio-committee system approach to policy-making has its problems, however. Increasingly, bands are searching for expanded alternatives or supplementary approaches to organizing for policy-making. The Kahnawake Band's emphasis on citizens' committees is one such approach. There are others.

Since 1983, the Alexander Band, for example, has become more and more dissatisfied with a portfolio-committee system based upon the assignment of responsibility for specific services and functions to individual council members and designated committees (Alexander Band Council, 1985). This Alberta band feels that such a system defuses and disorganizes the governing authority in its community. The portfolio system allows for a division of labour. It, in fact, requires it, and this the Alexander Band Council believes can be a disadvantage as well as an advantage. At one point, the Alexander Band Council had twenty-one departments delivering services. These units were overseen by a complicated web of committees. This is a large number of departments for a band with about six hundred to seven hundred resident members. Often, services were judged to be duplicated and uncoordinated. There were gaps in services to citizens and band residents, and individual programs were seen as not properly answerable and responsible.

To deal with these problems, the Alexander Band developed a new management system. This system is purposely based on the traditional concept of the "Medicine Wheel." The council's service responsibilities are grouped in a nonhierarchical and multirelated way according to the "emotional, physical, spiritual, mental" needs of the band members. The band also developed a small number of central boards to coordinate and relate the process of citizen decision-making, council policy-making, and policy implementation in relation to these services.

The Blood Council has taken a somewhat similar approach to the Alexander Band in dealing with the problems of organizing for policy-making. It did so with the introduction of the Council's Constitutional Department. This department is the only Council structure that does not deliver direct services. Its functions are purely advisory in nature. It operates much like a secretariat to the council, undertaking policy analysis. Such approaches are useful for dealing with many practical problems relating to policy-making processes, problems that must be addressed if Indian governments are going to be able to exercise a greater degree of autonomy.

Band councils face almost impossible tasks because of the broad range of activities in which they must take part. The consequences are sometimes staff and councillor burn-out and/or inefficient and ineffective policy-making and service delivery, often because of inadequate training (see Driben & Trudeau, for example). As a result, band councils frequently initiate or join with other organizational entities. The Walpole Island Band Council has established, for instance, the Nin da Waab Jig Research Centre to promote "self-sufficiency through good resource management and planned development." Many band councils have initiated or encouraged independent education societies, economic development corporations, and drug and alcohol abuse centres. Since the late 1960s, many bands have also turned to tribal councils, to groupings of several bands to achieve common ends. The growth of tribal councils has in many parts of Canada paralleled the growth of Indian government.

## Tribal Council Government

The creation of tribal councils is one of the most common strategies used to overcome many of the problems experienced by band governments, particularly those relating to smallness, complexity, finance, localism, and intergovernmental relations. Tribal councils are also subject to many of the same challenges faced by band governments. Nevertheless, tribal councils can offer band governments significant advantages as they attempt to address the practical realities of efficient and effective policy-making.

Tribal councils, unlike band councils, are not creatures of the *Indian Act*. Often they are registered societies in the provinces where they are located, but such a status is only a reflection of the lack of an adequate legal basis for their activities in Canadian law. These structures of Indian government have many origins. Sometimes, they start as lobbying or single-issue groups. Frequently, they are established as part of the devolution of program delivery from INAC to bands, filling much of the void left by the withdrawal of the INAC bureaucracy. Often, they represent nations of Indian people who have been inappropriately split apart by the creation of separate bands and who wish to rejoin for political and administrative purposes. They may start for all of these reasons.

The Nuu-chah-nulth Tribal Council (NTC) is one of the most established and authoritative tribal councils in Canada. In many ways, its activities provide indications of the responsibilities and challenges tribal councils face (Braker). The successor to the West Coast District Council, a loosely formed political coalition, the NTC is composed of fourteen member bands from the Nuu-chah-nulth nation, a nation that is spread along the west coast of Vancouver Island and adjacent islands. The total membership served is over five thousand, with some bands having less than one hundred and others more than one thousand in population. The mandate of the Tribal Council has expanded from that carried out by its predecessor and now includes the facilitation of Nuu-chah-nulth control over program and service delivery, representation of the member bands in self-government negotiations with Canada, and the pursuit of a comprehensive land claims settlement.

The authority of the NTC is delegated by its member bands. All chiefs and councillors from the bands form the board of the Tribal Council and constitute its decision-making body. The NTC offers advisory and support services to the bands much as INAC previously did, if in different ways with different values and generally perceived higher levels of effectiveness. NTC provides its member bands with the services of financial and local government advisors and a district engineer. It also engages in fisheries and forestry management with and on the part of the bands, produces a newsletter, and retains legal assistance. The NTC Economic Development Corporation, a separately constituted entity, provides assistance to individuals and bands engaged or seeking to be engaged in business. In 1988, the NTC signed a large block-funding agreement with INAC on behalf of its member bands. The Council also provides bands with support through the coordination of educational activities; alcohol and drug counselling services; membership matters; social development; community health; and, most notably, child welfare services. In this latter area, as well as in several others, it stands with the Dakota Ojibway Tribal Council as one of the foremost Indian governments in Canada.

The process by which the NTC and its member bands undertake nonresidential infrastructure development in the villages within the tribal area provides a good insight into the relationships between the Tribal Council and the band councils, and, in particular, into the division of political and administrative tasks these governments use to accomplish efficient and effective policy-making. NTC co-ordinates a village capital development process utilizing the following steps:

- the tribal council sets the broad terms of reference for considering capital project proposals from the band councils;
- individual band councils develop and place in order of priority their detailed proposals for funds with the assistance of band planners or consultants;
- the tribal council, with input from both staff and council as well as from consultants, evaluates each proposal, determines priority of proposals in terms of overall tribal objectives, and allocates funds for projects approved for band or tribal council involvement; and
- the tribal council's district engineer monitors projects until completion.

With this process, the NTC uses its administrative staff to support proposals and develop projects initiated by individual bands and eventually assessed by all bands. The result is an intricate but clear weaving of policy-making in relation to important matters for citizens — water, sewers, and roads. Band and tribal council authorities as well as political and administrative responsibilities are intermixed in such a way as to effectively meet many of the practical challenges of Indian government.

Many of the Nuu-chah-nulth Tribal Council's major activities stem from the administrative authority or delegated powers and functions its member bands have assumed from the federal and provincial governments and then delegated to the Tribal Council. It does not perceive such authority as a form of self-government, but rather as "one further step on a long road to self-government" (Braker). It sees many advantages of such a step in the "intervening period" until the realization of full First Nations government, and it recommends these advantages to other Indian governments in this way:

> Firstly, the First Nation would have the opportunity of securing staff and resource persons necessary for the future function for self-government. Secondly, the First Nation would have the opportunity of developing expertise in such vital areas as administration, fiscal management, program development and planning. Thirdly, an opportunity would be afforded for

> the First Nation to begin program and administrative structure development for eventual self-government. And fourthly, the First Nation would hopefully be in a better position to begin the process of planning for self-government (Braker).

Such an approach may create concerns as well as greater possibilities for Indian governments seeking self-government. It can result in too high a level of expectations on the part of members. It can also place a First Nation government in the awkward position of administering the policies of other governments who do not accept the status that the Indian government defines for itself. In this sense, such a strategy could lead to assimilation rather than recognition, but this outcome is not predetermined. In the instance of Nuu-chah-nulth, for example, it is countered by an intense emphasis on culture, tradition, and customary political authority as a balance to assimilation.

From a practical viewpoint, the Nuu-chah-nulth Tribal Council enables its member bands to overcome many of the policy-making problems they most frequently encounter. It allows small bands and bands that have less administrative expertise to benefit from the resources of larger, more well-endowed bands, and from a tribal staff. It enables bands to assume a tribal level perspective and thus to overcome some of the limits of localism. It helps to bring more of the direction of the activities of Indian government into Indian communities and out of the hands of external bureaucracies, making accountability to Indian people more likely. With its emphasis on culture and customary political authority, it provides an anchor for cultural engagement and a basis for the continuity of tradition. It provides a useful mechanism for intergovernmental and fiscal relations; a strong political voice and administrative arm; and a well-worked-out pattern for the interactions of various Indian government entities. This strategy is an intricate and multifaceted response to complexity.

Almost all tribal council governments justify their activities in terms of the opportunities that they provide to their member bands as the local governments closest to their citizens, but different tribal councils have different levels of power in relation to their bands. Some, such as the Nuu-chah-nulth, have a great measure of authority. Others do not. Some tribal councils are powerful in particular areas, such as child welfare and housing, and not in others, such as education and health. These variations in the character of the relationships between tribal councils and their member bands reflect many factors, including the history of their development and the similarities and differences between the governing needs of bands. Such relationships often can best be understood in terms of the division of political and administrative or service responsibilities between the different levels of Indian government.

Some tribal councils are more concerned with political functions; others place the accent on service delivery functions. The Nuu-chah-nulth Tribal Council is highly concerned with service delivery. It also takes a strong political decision-making and execution role in relations with its member bands and other governments. It is, in a sense, a *comprehensive* tribal council which has developed a very broad range of political and administrative activities. There are many examples of such tribal councils. The Carrier Sekani Tribal Council (CSTC) in north central British Columbia is one, although it is oriented less toward service delivery than the Nuu-chah-nulth (Cassidy, 1988c; Carrier Sekani Tribal Council, 1987b). The Dakota Ojibway Tribal Council (DOTC) in southern Manitoba is yet another, although it is less active in a full range of political matters than is the NTC (Indian and Inuit Affairs Program, Manitoba Region).

The NTC, CSTC, and DOTC are each comprehensive tribal councils, but they each differ in important ways that relate to their origins. The NTC's predecessor was political: it represented bands in lobbying efforts in relations with other governments. When it was created, the NTC retained this mandate and added service responsibilities. The Carrier Sekani started as a political body, struck by its member bands to pursue a just land claims settlement and related goals. It added its service role in an evolutionary manner. The DOTC started with an service mandate and only after several years began to develop a political one.

Some tribal council governments develop in only one of the two domains, political or administrative. The North Coast Tribal Council in northwestern British Columbia, for instance, started and has remained as a service delivery agent for its member bands. Some of these bands belong to the Haida Nation Tribal Council. Another belongs to the Nisga'a Tribal Council. In these latter organizations, they pursue more political goals such as land claims settlements and participation in the governance of fishery and forestry resources. The Shuswap Nation Tribal Council in south central British Columbia is at the other end of the spectrum from the North Coast (Shuswap Nation Tribal Council, n.d.). Its role is limited to doing research work and coordinating policy-making in relation to matters such as land claims and self-government negotiations with the federal government. The Gitksan-Wet'suwet'en Tribal Council

(GWTC) is an example of a council that has taken on an extensive political role in relation to resource management, self-government negotiations, and land claims (Cassidy, 1985). The GWTC has chosen deliberately not to take on a broad service delivery role. The nine Gitksan and Wet'suwet'en band councils in the tribal region have developed another agency, the Gitksan-Wet'suwet'en Government Commission, to facilitate service delivery (Gitksan-Wet'suwet'en Government Commission).

Many further examples of variations in tribal council functions and origins could be offered. Tribal council government is similar to many other kinds of Indian government in its diversity and the challenges it must face. Many bands, particularly bigger and more developed ones, choose to remain independent of tribal groupings. Others join on a tribal level. This diverse pattern will continue.

As the policy-making tasks of Indian governments expand with the development of Indian government in practice, and as Indian people continue to articulate more fully their political preferences, the roles of tribal councils will undoubtedly grow. So, too, will the roles of other Indian governments at the band and more traditional levels, but each of these levels of Indian government will face the challenges of Indian government within the Canadian federal system, a system that has not yet been restructured or reoriented to fully recognize their status as First Nation governments. The task of providing government services and political representation in a context where the authority of a government is disputed is not an easy one, but it is a central part of the meaning of Indian government in practice.

# 5

# Service Production and Delivery

Indian governments, as do all governments, face the problem of getting services produced and delivered after policy decisions are made. Indian governments, as do all governments, have services produced and delivered in a variety of ways. Many of these ways are purely a continuation of practices based on past decisions. But, as Indian governments assume increasing responsibility for a broader range of services, the benefits of utilizing different production arrangements for different services become apparent, and changes in patterns of service production and delivery are occurring. It is by examining some of these changes that one can begin to see what might happen as Indian governments continue to be extended, particularly with regard to their range of responsibilities and the intergovernmental relationships in which they must engage.

Service production and delivery patterns on the part of Indian governments indicate that First Nation governance has an extensive meaning in practice. The outcomes and limitations associated with these patterns provide an excellent example of the growing role of Indian governments and the problems they encounter because of a lack of suitable arrangements at both the legislative and the constitutional level.

## Indian Governments and Local Government

Most of the research on production arrangements for different services has been done at the local government level, where it has been concluded that different services require different scales of production, and that it is often useful to have different components of a service (e.g. garbage collection versus garbage disposal, or fire inspection versus fire suppression) undertaken by different organizations. Local governments use a variety of production arrangements, including managing their own production, contracting for receipt of a service from another government or private firm, entering into joint agreements with other local governments, and entering into joint agreements with provincial or national governments. Findings from research on how local governments match different production arrangements to different activities provide some useful parallels and insights on service production by Indian governments. These insights, of course, must take into account similarities and differences between Indian governments and local governments.

Indian governments are similar to small local governments in that many Indian governments, especially band governments, are general purpose local governments for groups of people concentrated together who need basic services, such as roads, water supply, waste disposal, policing, and fire protection. Band governments are also like small municipalities in that there are many different activities to be performed, some of which may best be produced on a larger scale than is possible for the small government to undertake.

Indian governments also differ from municipalities. First and most importantly, they are First Nations governments and thus differ in terms of their political status, both for their citizens and for other Canadian governments. They require and receive a much more intense level of loyalty from their members, and they interact with other governments on a much more forceful basis. Secondly, Indian governments are potentially responsible for a much broader range of functions than is any local government.

While the division of functional responsibility among local governments and between local governments and the provincial government varies among Canadian provinces, small municipalities are usually not responsible for running schools, cultural programs, and social assistance services. These functions are generally the responsibility of separate school districts, private associations, and the provincial government respectively. Because of their broader range of responsibilities, Indian governments face even more severe challenges in arranging for the production and delivery of services they desire. This implies that to obtain services, Indian governments, especially small ones, will also need to enter into agreements with other organizations, including other bands, tribal councils, and First Nation groups, as well as non-Indian local governments, provincial ministries, and federal departments. It is important to keep in mind, however, that as Indian governments do so, they still make the key policy decisions and then enter into agreements to have a service produced. They do not surrender their governing authority by entering into such agreements. In fact, they may be able to implement their governing authority more effectively with these relationships.

A third way in which Indian governments differ from local governments is that local governments have statutory corporate authority and a long history of entering into agreements within a well-defined legal system. Local governments also enjoy generally recognized revenue raising authority. They receive grants from senior governments. They have taxation authority and the right to levy a variety of user charges, fines, and fees. At present, most Indian governments do not possess corporate authority, do not operate in a well-defined legal climate, and seldom have authority for an actual independent revenue base. The lack of these features makes managing Indian governments more difficult than managing local governments.

A fourth way in which Indian governments differ from local governments is that many Indian governments have as a major objective the maintenance of their culture and have preferences for styles of service delivery that are distinctly different from those of non-Indians. These differences do not affect some services a great deal—water supply or fire suppression, for example—but may be critical for other services such as education and child welfare. While many local governments have cultural differences, the differences are seldom of sufficient magnitude to preclude joint agreements with adjacent governments where agreements would otherwise be beneficial. But cultural differences between Indians and non-Indians may force Indian governments independently to undertake activities that small local governments would undertake on a larger scale, or may force Indian governments to form larger scale organizations among themselves. This may complicate service production, especially for smaller Indian governments that are relatively isolated from other Indian governments.

Still another way in which Indian governments differ from local governments is related to the particular social conditions faced on many reserves and the corresponding levels of service delivery. While it is difficult to do comparisons of services in Indian communities relative to services elsewhere, there are indicators that government services for Indians are frequently either provided at a lower level, or, if provided at "equivalent" cost, do not achieve the same results. The *Penner Report* concluded that services on reserves are generally lower and that problems are more severe. For example, Penner pointed out that only 20 percent of native students have completed secondary school relative to a 75 percent national average, and fewer than 40 percent of Indian households have running water, sewage disposal or indoor plumbing compared to a national average of 90 percent. Social problems on reserves are also severe, with children in care approximately five times the national average.

Thus, while Indian governments resemble local governments in regard to providing basic services and being the "general" governments for the people in their community, differences associated with their political functions, much broader range of responsibilities, and ambiguous legal and fiscal status; a focus on maintaining a culture that differs from that of non-Indian governments; and low levels of some services make the governance and management of service delivery relatively more difficult for Indian governments than for local governments. When combined with the relatively small size of many Indian governments, providing a full range of service requires innovative and often unusual production arrangements. In spite of these difficulties, Indian governments have developed a wide variety of production arrangements in order to provide services to their citizens in a responsive and effective manner.

## Service Production Characteristics of Indian Governments

Different public services possess different production characteristics. As far as Indian governments are concerned, two of the most important characteristics include whether or not an activity is culturally and personally sensitive and whether or not an activity is most efficiently performed on a larger scale than can be undertaken by a single community. Road paving, for example, is relatively impersonal. It is basically an engineering function, and an understanding of Indian culture is not critical for designing and operating an efficient system. In contrast, child welfare programs, including daycare, problems of abuse, guardianship, and adoptions, are central to the preservation of Indian culture and must be provided in culturally sensitive ways if these programs are to achieve desirable results. With regard to scale, many activities, including police patrol or the provision of elementary schooling, may be organized by a small community, but the training of policemen or provision of more advanced or technical education may be most efficiently provided to many communities simultaneously. When considering the service production arrangements that characterize Indian governments, it is necessary to take into account questions surrounding both the scale at which service production best proceeds and the cultural sensitivity required.

In addition to the two characteristics of service production indicated above, the geographic location of a government is also important. Some bands, for example, are small and in isolated locations such that no matter what economies of scale in production may exist for a service they are not relevant. Because of its isolation, an Indian government in this circumstance simply has to find innovative methods of production. In other cases, band governments may be small, but they may be located in close proximity to other bands or to other local governments. In this situation, these bands may find that where economies of scale exist, they can obtain services more efficiently by making joint agreements with other governments—perhaps with other Indian governments for culturally sensitive functions or with non-Indian governments for such relatively impersonal functions as water supply, sewage disposal, or road paving.

Putting these differences aside, Indian governments tend to have many of the same service production patterns and possibilities that local governments do. When local government production arrangements are examined, for example, many observers are surprised at the diversity of the arrangements through which these governments get services produced and delivered to their citizens. In addition to "standard" production by their own employees, local governments contract with other local governments and private firms for some activities, enter into joint agreements with other governments, help coordinate and support volunteer groups, grant monopoly franchises, and frequently implement programs designed and financed by the provincial or federal governments (Bish, 1987b). This diversity exists for virtually all local governments. For example, even single purpose local governments such as school districts often contract out for school bussing, janitorial, and school lunch services instead of running them through their own bureaucracies. Municipalities, in addition to contracting out, also use large scale local governments such as counties and regional districts to provide services where large scale production is desirable. Indian governments follow similar courses of action.

## Indian Government and Service Provision

Indian government raises many questions about the arrangement of service production. The best way to understand the uses, advantages, and disadvantages of alternative production arrangements is to examine how Indian governments actually produce the services they have decided to provide. By adhering to such a method, examples of major functions can be examined. These major functions include education; social services; health care; policing and justice; local infrastructure including roads, water, and sewage disposal; garbage collection; and fire protection. The practices of Indian governments with regard to resource management and economic development can also be examined.

On the basis of such an approach, general conclusions may be drawn on the way alternative production arrangements are used to relate to issues of scale, cultural sensitivity, and isolation. While the practices described below are selected for the most part from observations of the bands and tribal councils visited especially for the research for this book, and hence are not based upon a random sample of the activities of Indian governments, they still reveal the wide use of alternative production arrangements that characterize the operations of Indian governments in practice.

### *Education*

Many Indian governments have selected education and the care of children in general as a major focus for their government activities. Their attitude is that unless children can be brought up with both an appreciation of Indian culture and an education to function in the larger society, Indian people may be committing cultural genocide.

Historically, education for status Indian children has been provided through residential schools located off reserves or schools on reserves, both operated by INAC. Since the end of World War II, schooling often has been provided under arrangements with provincial governments. These arrangements are usually through master tuition agreements where INAC pays the provincial government for status Indians attending public schools. Individual Indian governments often do not participate in the negotiations or have any voice in the education provided. Contracts also exist with private schools, usually religious, with mixed input from band governments.

The performance of this system as a whole has been poor. According to INAC data, only 26 percent of status Indians fifteen years and older have completed high school or gone beyond it, compared with 52 percent of the reference population. High school completion is also more common among Indians off-reserve than on-reserve (First Ministers' Conference, 1987b).

Three different ways of approaching education and assuming government over that important function are illustrated by the Alexander Band, the Nisga'a Tribal Council, and the Kamloops Band. These are just three Indian governments of the many that have assumed major responsibilities for education, but they are three that have assumed such responsibilities in different ways.

A review of educational progress in the Alexander Band in 1978 indicated that there had been no high school graduates in the past ten years, that truancy was usually near 60 percent, and that Indian children averaged three grades behind grade level in standardized examinations (The Kipohtakaw Education Centre). This Alberta band decided that it would create its own schools, beginning with grades K-4 and adding one grade per year. The Kipohtakaw Education Program became a centre of activity for the band. This program expanded to include not only the school itself, but a child development program for ages two to four; a special education classroom; preschool daycare; a nutrition program with "vitamin a day," hot meals, and cooking classes; a computer in every classroom; a computer lab with full-time attendance; the participation of elders for discipline, teaching the Cree language, and teaching cultural history; a preventative health program; a high school recovery program to reclaim past dropouts; a job entry program; and a two year pre-university program organized jointly with the Yellowhead Tribal Council. This education program has become the centre of the community, and is one of many examples where band governments have taken over almost complete responsibility for education.

While many Indian governments, especially larger ones in isolated locations, are assuming responsibility for their schools, others have found ways to govern their education programs in joint arrangement with other governments. Two of these examples are the Nisga'a Tribal Council and the Kamloops Band, both in British Columbia. British Columbia is a province where most bands are small and most status Indian children attend public school under a master tuition agreement. For funding purposes, school districts receive formula grants for pupils, with status Indians treated no differently from other students (but for which the federal government reimburses the province on an average-cost basis). British Columbia also makes available to school districts that want to develop special programs for Indians an extra per-student grant, but it is not required that the school districts developing these programs consult in any way with Indian governments or local bands. Most Indian governments want a greater voice in the education their children receive, and some have achieved it.

The Nisga'a Tribal Council represents four villages in the Nass Valley, an isolated valley in the northwestern part of the province. In 1976, the tribal council negotiated an agreement with the provincial government whereby a regular public school district, the Nisga'a School District, was created for the Nass Valley. The school district functions within the regular provincial school system. It is made up of an area including five villages, four of which are Nisga'a. The other is non-native. The district is governed by a board with one member elected from each community; thus, the board is composed of one non-Indian and four Nisga'a members.

The system consists of three primary schools and one secondary school and serves six hundred students, 90 percent of whom are Nisga'a. A heavy bilingual and bicultural emphasis has been developed, and student performance has markedly improved. The secondary school dropout rate has been cut from 90 percent to less than 10 percent. The percentage of graduates going on to higher education and student test results on standardized exams are both above the provincial average.

There are obvious reasons for maintaining integrated schools in isolated areas where populations are low, but the Nisga'a do comprise a larger group than many bands who run their own schools. The Nisga'a chose to remain within the provincial public school system, however, because it appeared to them to be much more adequately funded than equivalent federally funded Indian schools. The Nisga'a feel that they are achieving their government objectives within this joint system.

Still a third kind of approach is illustrated by the Kamloops Band joint agreement with the Kamloops School District. Even though the Kamloops Band is one of the larger bands in British Columbia, it is neither isolated nor sufficiently large to desire to maintain its own school system. What the Kamloops Band has done is to enter into an agreement to have the Kamloops Public School District run a school, the Ske'lep School, on the reserve. The school maintains a ratio of 3:1 native to non-native students, uses native teachers, and includes supplementary educational material prepared by the band and tribal council. The School District has also taken upon itself to introduce some of the materials prepared by the native cultural society for the Ske'lep School into other schools in its district. Since the creation of the Ske'lep School, it has been observed that Indian teachers expect higher performance from Indian students than do non-Indian teachers; students exhibit considerably more self-confidence; and there is considerably more parental involvement with the school than when Indian children attended public schools off the reserve.

The Alexander, Nisga'a, and Kamloops examples represent alternative ways of having educational services produced with a significant degree of self-government. Both the Alexander approach of actually running independent schools and the Kamloops approach of combining a reserve-based school with a public school system are used elsewhere. The Nisga'a approach of having a provincial school district specially created to encompass the Nisga'a Tribal Council area is unusual, but there may be other situations where it is an appropriate way to combine self-government with other institutions.

All three of these arrangements illustrate how Indian self-government in education can accommodate and be accommodated by the Canadian system.

### *Social Services*

There is a great need for social services in Indian communities. According to the Nielson Task Force report, the average individual incomes of aboriginal peoples are approximately two-thirds of the national average. Aboriginal families and households are larger than those of other Canadians and are more apt to include extended family members. The rate of single-parent households is twice that of the general population. The number of status Indian children in care (i.e. under the protection of a child welfare authority) is five times the national rate.

Nearly all bands and tribal councils undertake some direct administration of social services. Walpole Island, for example, assumed responsibilities for the administration of income assistance in 1961. With regard to social assistance, it is difficult to determine how much policy bands are permitted to develop in contrast to simply administering federal or provincial regulations. As with other activities, all Indian governments do not do everything in the same way, and different Indian governments have very different relationships with provincial governments—which also have responsibility for social assistance, and especially for policies regarding child welfare.

Some Indian governments have been able to assume a significant degree of self-government in relation to child welfare programs, but almost always with provincial government agreement, and often in spite of opposition by existing child welfare agencies. One of the first assumptions of responsibility for child welfare, including adoptions, was by the Dakota Ojibway Tribal Council (DOTC) in Manitoba.

From 1966 through 1979, members of the DOTC received child-care services from three different, non-Indian, children's aid societies pursuant to a provincial/federal agreement. During that time, over 335 Indian children were removed from reserves and adopted into non-Indian homes, mostly in the United States (Dakota Ojibway Tribal Council). The tribal chiefs regarded these imposed adoption policies as a disaster. Following negotiations with the provincial government, the Manitoba Director of Child Welfare delegated the responsibility for child welfare programs for DOTC children to Dakota Ojibway Child and Family Services, Inc. (DOCFS). Ultimately, the Manitoba government amended the relevant legislation and has provided DOCFS with all provincially delegated authority over child welfare, including, in 1983, adoptions. DOCFS currently has a staff of thirty-three and undertakes a full range of child related services for the bands (Dakota Ojibway Child and Family Services).

Other Indian governments, including the Nuu-chah-nulth Tribal Council on the west coast of Vancouver Island, have modelled their own agencies more or less along DOCFS lines. The Nuu-chah-nulth Tribal Council had many of the same conflicts over adoption policies with non-Indian child welfare administration as did the DOTC, but ultimately the Nuu-chah-nulth achieved, with the provincial government in British Columbia, an agreement that gave the Tribal Council the authority to deal with adoptions. The Nuu-chah-nulth Tribal Council, like the DOTC, provides a full range of children's services.

Most Indian governments have not achieved a significantly increased amount of self-government over child welfare, but many have reached accommodations with local or provincial social work administrators that are acceptable as immediate measures. For example, the Kamloops Band has a full-time, fully trained social worker (an Indian from another band) who undertakes most counselling and the working out of arrangements for children. However, if an apprehension is required, this social worker calls in provincial officials. The band feels that a practice such as this lets its social worker be most effective as a counsellor. Counselling effectiveness, it maintains, would be reduced if the social worker were also responsible for apprehensions. Band-based social workers often face such dilemmas because few bands are of sufficient size to have large social work staffs—something that both the DOTC and the Nuu-chah-nulth Tribal Council are able to achieve as tribal councils serving several bands.

### *Health Care*

Indian people use hospitals two to two-and-a-half times more than the national population. Suicide rates are very high, and high infant mortality rates persist—approximately 60 percent higher than the national rate. The relationships between Indian governments, public health authorities, and hospitals vary tremendously across Canada.

A few bands govern hospitals and provide comprehensive health services delivery, usually after taking over the operation of Health and Welfare Medical Services facilities. For the most part, this takes place on larger, more isolated reserves. In other places, the focus is not on hospitals, but on health counselling, preventive care, smaller health centres, and in some cases, nursing homes. In many smaller bands, such as in British Columbia where Indians utilize physicians and hospitals through the provincial medical plan, Indian programs are often confined to community health workers or nursing counsellors who frequently serve more than one band. Given the very poor status of the health of Indians relative to non-Indians, it would appear that there are still serious problems in the delivery of health services. Because of costs and regulatory structures, however, health services delivery is an area where it is difficult for Indian governments to take the initiative to improve conditions for their members.

One example of a band-managed health care system is Saddle Lake's. The Saddle Lake Band, with approximately three thousand members, is located northeast of Edmonton. The Saddle Lake Band has developed a modern, multipurpose health centre which includes a public health office, physicians, physiotherapists and pharmacy, X-ray, laboratory, optometry, dental, and emergency services. These facilities are funded primarily by Health and Welfare Canada.

Another large band in Alberta, the Blood Tribe, which consists of approximately six thousand members, is also in the process of developing a comprehensive health services system. The Blood Tribe initiative is the result of a 1976 task force created to deal with a Health and Welfare desire to phase out an old hospital on the reserve. Health and Welfare has funded a new centre which will be as comprehensive as Saddle Lake's.

While few bands have health care facilities as comprehensive as those of Saddle Lake or the Blood Tribe, many bands are managing more specialized facilities. Six Nations, for example, runs a nursing home for the elderly; the Mohawks of Kahnawake run a hospital formerly run by a religious order; and other bands and tribal councils provide nursing and counselling services.

For many smaller bands, it is difficult to manage health services just for band members because there are many health care specializations that cannot be fully utilized by a small population. Thus, while health services are extremely important, efforts to augment Indian self-government in relation to this important function are likely to focus on preventive counselling and assisting Indians to interface with other suppliers. This will be true in all but the largest bands or tribal councils. While selective services may be run by Indian governments, the separation of Indian and non-Indian services in all areas of health care is not feasible in most instances.

### *Policing and Justice*

Canadian Indian governments, unlike those in the United States, have not assumed a major role in policing and the justice system. The extent of such involvement for many bands is the appointment of a special constable, funded by INAC, who performs band related patrol and enforcement duties in close relationship to another police department. Where Indian governments undertake policing and justice activity, they have worked out jurisdictional arrangements with their respective provincial governments and function in more or less orderly relation to provincially organized policing.

The Mohawks of Kahnawake have one of the band-based police forces in Canada (Kahnawake Arena Committee). The Peacekeepers were reorganized in 1982 and are administered by a justice committee consisting of two members of council, a representative from social services, the fire chief, one policeman, a court representative, and the representative of a conservation group. The department has nineteen members, and the band has its own court with two Justices of the Peace. The police on the reserve function like any force would in another community, although they also enforce band bylaws (something an RCMP detachment would not do), and they do not appear to enforce some federal laws that violate treaty rights. The Jay Treaty, for example, exempts Indians from customs duties, but the Federal Government has refused to enact implementing legislation (Francis v. the Queen), so band police do not appear to enforce "smuggling" violations. Asserting broad jurisdictional powers, in relation to policing matters, the Mohawks of Kahnawake have not been able to define an easy relationship in the federal-provincial system.

Other Indian policing departments fit more readily with existing federal-provincial policing systems. The Walpole Island Band has maintained its own police department under a tripartite Ontario/federal/provincial Indian association agreement for some time. In Manitoba, the Dakota Ojibway Tribal Council maintains a police force which is divided into units to serve the communities of the eight bands. It functions under the Manitoba *Police Act* and again, involves a tripartite agreement. Its eleven member police commission includes the eight band chiefs and representatives from the RCMP, Manitoba Police Commission, and INAC. Policemen receive training at the RCMP Academy in Regina. As with band departments, DOTC police enforce band bylaws in addition to regular policing functions.

The Saddle Lake Band also undertakes policing, but it has eliminated its police force and moved to a traditional dispute resolution system instead of a regular police force (Alberta Law Foundation, 1986). Instead of treating criminal acts as crimes against the state, where resolution in courts and sentencing does nothing to resolve the issue among band members, the band has developed a complaint resolution process. Complaints against known or unknown persons are submitted to a Tribunal Secretary, who then refers the complaint to a Peacemaker. The Peacemaker investigates the complaint (much like a policeman would) and then attempts to mediate a resolution satisfactory to the complainant. If the Peacemaker is unsuccessful, a hearing before the Band Tribunal is held and a binding decision rendered. While this system does not fulfil all policing functions, it does resolve many disputes before they become major and helps maintain a sense of self-control within the community.

One serious deficiency that band and tribal council police forces do enable these governments to overcome is band bylaw enforcement. Without their own police forces, bands had virtually no enforcement capacity over band bylaws—a problem that is similar to that of small municipalities which are served by RCMP contracts.

Because municipal bylaws are not "criminal," RCMP do not enforce them; for the same reason, they do not enforce band bylaws. Municipalities resolve this problem by employing bylaw enforcement officers and relying on provincial courts. Bands are in a more difficult position for two reasons. First, INAC does not provide funding for bylaw enforcement officers; and second, to obtain enforcement, it appears that a band would have to hire a lawyer to bring forth a private prosecution in the Trial Division of the Federal Court. This is an expensive and awkward process.

As Indian governments widen their area of jurisdiction over justice matters and provide more services to their members, some alternative mechanism will be needed, which, at minimum, requires and enables a band or tribal council organization to enforce bylaws. Also necessary will be an adjudicatory mechanism, such as Justice of the Peace courts (which are provided for in the *Indian Act*, but seldom used). If Indian governments gain the kind of powers they are seeking, then considerable attention will have to be given to the organization of policing and justice. Policing and justice is an area where, at present, Indian government is less developed than for other important governmental functions.

### *Local Services*

Practically all bands are active in governing the provision of local services such as roads, street signs, water supply, septic disposal, and fire protection. These are functions for which neither INAC nor the federal government has set up its own production bureaucracy (as with education and health) and where extensive reliance has not been placed on the delivery systems of other governments such as provincial social services, medical services, school systems, or the RCMP. Bands that govern local service provision, however, do not always use their own employees to produce the services. Local services are an area of many intergovernmental agreements. Geographical proximity to non-Indian local governments often permits and encourages cooperation between Indian and non-Indian governments.

Larger bands and isolated bands tend to produce their own local services. This production has traditionally been funded on a service-by-service basis by INAC and has provided employment opportunities for band members as well as services for band members. This means that for small bands services can be quite expensive on a per capita basis, because some services do possess economies of scale over some range. It also appears that high costs and limited INAC funding has resulted in an unusually high number of unpaved roads; separate wells and septic tanks instead of village water and sewer systems; and very limited volunteer fire departments on many small, isolated reserves. Of course, these conditions also exist for many non-Indian, rural settlements as well, unless a particular settlement is incorporated into a municipality where the municipality's major function is to provide such services.

As might be expected, many larger bands—bands such as Walpole Island in Ontario, the Mohawks of Kahnawake in Quebec, Alexander in Alberta, and The Pas in Manitoba—have well-developed organizations to produce local services. Many tribal councils are also involved in local service production, but in a different role. The DOTC, for example, has a fire prevention program which provides training to band volunteer firemen, inspection services, and code enforcement. For its member bands the Nuu-chah-nulth Tribal Council provides engineering services, a local government advisor, and a financial advisor. In both of these cases, the tribal councils provide local services for small bands that would find these services too expensive to provide on their own.

Not all bands produce their own local services. Local services do not have the same degree of cultural sensitivity as do education, social services, health and hospitals, and policing and justice. Hence, when the opportunity arises, bands often are willing to contract with non-Indian governments or private firms for these services. For example, the Mohawk of Kahnawake contract with private businesses for snow removal and road construction, while The Pas Band contracts with the provincial government to maintain its roads and with a private firm for garbage collection. Some bands also sell services. The Saddle Lake Band, which maintains a very large road maintenance shop, sells road construction and maintenance services to the Alberta provincial government.

The most widespread use of contracting by band governments to provide for local services on reserves occurs in British Columbia, where most bands are small and many are located within or adjacent to municipalities. The Kamloops Band, which for the most part is fairly self-contained, contracts with the City of Kamloops for fire protection services and with the Thompson-Nicola Regional District for building inspection services. The band also leases land to the city for the city's arena. More typical of smaller bands is the Katzie Band, on the eastern edge of the Vancouver metropolitan area. This band of approximately 232 members, of which 60 percent live on three reserves, has only four employees. Services are largely contracted for from surrounding municipalities. The adjacent municipality of Pitt Meadows supplies water, sewer, and fire protection services to one of the band's reserves. Garbage collection is provided by a private firm. Roads were formerly constructed under contract and maintained by Pitt Meadows, but the band switched to a contract with a private firm because its services were both better and less expensive.

Larger bands in urban areas of British Columbia also tend to use contracts instead of producing their own local services. The Cowichan Band, the largest in the province with just over two thousand members, has nine reserves in and around the City of Duncan. The band has one comprehensive agreement with the city to provide police, fire, garbage collection, street maintenance, traffic control, street lighting, water, and sewer services to a section of the band lands that is largely leased to non-Indians. The band also obtains many services from other governments for other parts of its reserves: water from Duncan; sewage from a joint Duncan-North Cowichan (municipality) utilities board in some areas, and from the Cowichan Valley Regional District in others; fire protection from Duncan, North Cowichan, and the Cowichan Bay Improvement District; and boundary road maintenance from North Cowichan and the provincial Ministry of Transportation and Highways.

A survey, undertaken during the course of the research for this book, found that forty-five British Columbia bands located within municipal boundaries had eighty-six contracts for various local services (Bish 1987b). The largest number were for water supply, followed by fire protection, sewage collection, garbage collection, and road maintenance. It was also interesting to note that, in spite of the band governments' lack of corporate status, 75 percent of the contracts between bands and municipalities were without INAC's involvement. In this survey, it was also noted that some municipalities provided local services directly to reserve areas without special contracts or payment. One Squamish Band reserve, for example, is served in this way by West Vancouver. This situation would appear to be unique to British Columbia, however, because it is the only province where local governments also levy property taxes on any reserve lands that have been leased to non-Indians.

Local services are one area where band-based government is fairly well developed. The provision of such services and the frequent use of intergovernmental cooperation to do so provide many good examples of the practical nature of Indian government and of how Indian governments are part of the federal-provincial framework.

### *Economic Development and Resource Management*

Another area in which Indian governments are developing a strong presence is economic development. Indians have much higher unemployment rates and much lower average incomes than non-Indians, and most Indian governments have some program to promote economic development. For many bands, economic development and land management are inseparable.

Economic development programs usually focus on one of a few themes, such as the development of band-owned enterprises; the promotion of small, Indian-owned private businesses; or the promotion of any project that would reduce unemployment, even if it is not expected to be a long-term, viable economic project (in this latter aspect Indian governments may be only too much like other Canadian governments). Indian governments face both general advantages and disadvantages in their potential for economic development. Some negative factors are institutional (INAC 1986c). These include lack of corporate status for band governments and a variety of protections from outside institutions which make borrowing—a prerequisite for virtually all businesses—difficult. There are also some institutional advantages—primarily tax exemptions for individual Indians on reserve lands. Not having to pay income tax for income earned on a reserve can result in lower pre-tax wages with equivalent take-home earnings and a potential for reserve-based businesses to be more cost competitive with off-reserve businesses.

The most important factor that influences economic development potential is not institutional, however. It is the size, location, and resource base of an Indian government. Large bands in urban areas or reserves with significant natural resources have advantages that simply do not exist in smaller, resource-poor, isolated reserves. Some of the most serious problems in this regard are found on many British Columbia reserves, which were not only set out to be much smaller than elsewhere in Canada, but in which federal and provincial regulations have also cut off reserve residents from utilizing their traditional resources, such as off-reserve fisheries, for their economic development base.

As might be expected, Indian band governments frequently build on the resource base that they have on reserve lands. Prairie bands with a history of agriculture, such as the Blood, Alexander, Goodfish Lake and Saddle Lake in Alberta, have continued to expand agricultural activity. The Blood Tribe has been especially expansive, with band-owned businesses including the Blood Tribe Farms, Mataki Farms, the Sawkee Feed Lot, and Blood Tribe Ranch. The band is developing a large irrigation project to bring even more land into agricultural production. The Goodfish Lake Band has expanded beyond reserve boundaries to lease extra pasture land and has used its ranching base to develop a feed lot operation and run a major rodeo. As well, all of these prairie Indian governments have developed nonagricultural businesses. The Blood Tribe, for example, has developed a large shopping mall, and actively promotes small business development. It also owns and operates Kainai Industries, which manufactures factory-built houses.

Many Indian governments in British Columbia promote natural resource based, nonagricultural development strategies (Sinclair). Both the Cowichan Band and Nuu-chah-nulth Tribal Council are involved in fishery development, for instance. The Stuart-Trembleur Band in the northern part of the province operates a large provincial tree farm licence (Cassidy & Dale). Nuu-chah-nulth and the Squamish Band also promote forestry management.

In central Canada, Walpole Island emphasizes its traditional natural resource base with its hunting and fishing permit sales, guide services, and Tahgahoning Enterprise, a very large farm. More recently, the band has been developing non-resource based activity, including a large production machine shop, Walpole Industries.

The DOTC has created a Dakota Ojibway Development Group which offers all kinds of support for small, Indian-owned businesses. This support includes feasibility studies, private sector contacts, an accounting service, insurance, and assistance with financing. The Pas, Six Nations, Mohawks of Kahnawake, and Squamish Bands also promote small private business.

It is difficult to assess the success of reserve-based economic development programs. Self-sustaining economic development is difficult for any government to promote, and the problems are no different for Indian bands. Such development, however, is an extremely important part of Indian government, for it can provide a basis for financial independence. Not all activities of Indian governments fall within the categories used above to discuss alternative ways to get services produced and delivered. The categories, however, do include most activities and illustrate the diversity that exists among Indian governments.

## The Emergence of Indian Government

The research for this book was not designed to focus on the social and economic problems of Indian people. Much research with such a perspective already exists. During interviews, Indian leaders often pointed to external problems and impediments to effective service delivery. The common themes were not new: they centred to a large degree on INAC policies. One theme was that there were inadequate funds to pursue new initiatives. This was partly attributed to less funding than desired, but it was also attached to the policies of INAC, the categories used for INAC funding, and the nontransferability of funds among categories. Another common theme was slow decision-making by INAC, which was identified as an impediment for Indian governments seeking to confirm and extend their authority in relation to various services.

INAC officials are well aware of these criticisms. Many of these problems are generic to any large bureaucracy. The more diverse the conditions service delivery must meet, the more likely a large bureaucracy will be unable to accommodate without problems. This, in fact, is one very practical argument for increased Indian government: Indian governments are relatively small governments which can avoid many of the inefficiencies larger governments often face.

Despite the limitations they face, many Indian governments have made striking progress in moving beyond INAC rules and regulations. While there has been a lack of progress at the constitutional level in defining Indian government, at the program level, Indian governments and other governments have moved significantly. One illustration of this tendency is the passage, implementation, and enforcement of many band bylaws without any involvement from

INAC. Generally, practices flowing from these bylaws are respected by the provincial and federal governments.

A second illustration of Indian governments moving on their own and other governments accepting the results is the extensive range of contracts Indian governments engage in, without INAC signature. It is possible that these contracts might be voided if someone brought an injunction to prevent them. Once benefits begin to flow, however, the courts will enforce them. Band governments are able to act as if they have corporate status similar to that of municipalities, and other organizations treat them that way. Unfortunately, the negative effect of such a practice is that Ottawa is not pressured to do a better job, and where INAC Ottawa agreements are needed, as with large, jointly funded capital investments, time delays may be crippling.

The third way Indian governments have assumed more governing authority than current federal-provincial policies might seem to allow, has been by frequently diversifying their source of revenues, so that the rigidity of INAC funding categories may be overcome. In fact, the ability to overcome such strictures is closely associated with many of the most innovative Indian government initiatives. This diversification of the financial basis for Indian governments is treated further in the next chapter.

The kinds of Indian government initiatives and service delivery arrangements identified above fit a framework which emphasizes issues of scale, cultural sensitivity, and isolation as a key to understanding the actual involvements of Indian governments in service production and delivery. They also indicate that different Indian governments have selected different services for development, and that, for example, the culturally sensitive areas relating to children —education and social services—have received considerable emphasis.

When a full range of activities in which Indian governments take part is examined, it appears that many of these activities, especially the culturally sensitive ones such as education and social services, are in areas where bands prefer to engage directly in service production. With other activities, such as relatively impersonal local services, bands are frequently quite willing to contract out for production by another government or private firm, particularly where geographical proximity makes such arrangements beneficial.

The key observation that emerges from an examination of the production of services by Indian governments is that Indian governments often take the initiative to make their own policies and then interact extensively with other governments to get things done.

They seek and need legislative and/or constitutional changes that recognize their jurisdiction and place their relationships with other governments on a firmer basis, but, while simultaneously seeking these changes, they continue to engage in a large variety of interactions with other governments. To an extent, these kinds of interactions are impossible to standardize and must be worked out on a First Nation by First Nation basis. Diversity in practice needs to be accommodated along with recognition in principle. Such an approach is completely consistent with the emerging nature of Indian government within the Canadian federal system.

# 6

# Finance

Indian governments require access to financial resources that are adequate to maintain a strong degree of independence. This requirement implies significant control over finance and budget decisions. In the past, band council control over band council operations has been severely limited by the processes through which Indian and Northern Affairs Canada and other federal departments provide funds. Any transition to the kind of governing arrangements First Nations governments are seeking is going to require very significant changes in both the philosophy and practice of financing Indian governments.

## Fiscal Arrangements and Indian Government

A starting point for the analysis of financing Indian governments is the presentation on intergovernmental fiscal arrangements in the 1983 report of the Special Committee on Indian Self-Government, the *Penner Report*. The *Penner Report* is useful in this context because it treated financial relationships in some detail. It considered a very wide range of Indian government issues, and its general diagnosis of problems and the directions posed for solutions has received a high level of agreement—at least among the last three Ministers of Indian and Northern Affairs and Prime Ministers Trudeau and Mulroney (INAC, 1984; Canada, 1984, 1985).

The most developed part of the *Penner Report* was its critique of past Canadian government policy toward Indian peoples. It accepted the Indian position that Indians were self-governing prior to colonization by Europeans and the right of self-government has never been surrendered. It recognized that Canadian governments, by virtue of greater population growth and power, simply forced native peoples into a state of imposed dependency where many of their traditional government practices were forbidden by law, and they were required to reorganize along European-style government lines. The result of past Canadian government policy has been considerable social disorganization and lower levels of employment, income, education, housing, and other goods and services than are common in Canadian society. All of this was recognized in the *Penner Report*.

An integral part of the *Penner Report* was its examination of the financing of Indian governments. The Penner Committee's approach to fiscal arrangements paralleled its approach to self-government in general, and began with a critique of the present financial procedures of the federal government:

> Present funding arrangements effectively deny Indian band councils and tribal councils control of the programs they administer; they exclude Indian people from policy-making; they place impossible accountability burdens on band councils that have assumed responsibility for administering programs; and they generate an excessive federal administrative and monitoring superstructure. In short, they inhibit the development of Indian self-government.

The committee also commissioned the Coopers and Lybrand Consulting Group to undertake a major study, entitled "Federal Expenditures and Mechanisms for their Transfer to Indians." This study documented excessive bureaucratic controls, which contribute neither to accountability nor efficiency in the use of funds. In fact, it observed that as more service responsibility is transferred to bands, administrative costs due to duplication and accounting requirements on the part of INAC actually increase rather than decrease (Coopers and Lybrand). It argued that current band funding arrangements excessively constrain bands from assuming responsibility for their own affairs, and accountability is still not being achieved. Following the study, the Penner Committee recommendations focused on increasing the accountability of band governments to their own people and on moving toward a federal granting system instead of the current system of contracts under federal supervision.

The Penner Committee recommended that "recognized" First Nation governments receive annually a single grant for government operations and delivery of all services. Accompanying the recommendation for grants was the explicit recognition that, with grants, "a federal minister would not be held accountable by Parliament for the way the funds are spent by an Indian government, just as federal ministers are not held to account for the way provincial governments spend equalization payments." In this way, the Committee suggested, the issue of funding Indian governments could be recast as an intergovernmental one rather than one of ministerial responsibility.

The treatment of intergovernmental fiscal relationships in the *Penner Report* was straightforward. The report first presented the position that First Nation governments should be constitutionally entrenched as a third order of government. It then recommended the concept of "equalization," as applied to different provincial governments, also be applied to Indian governments to ensure that similar levels of government services are available to Indian people in all parts of Canada, regardless of income or wealth. The exact amount of funds each First Nation should receive, the Committee suggested, should be negotiated.

The Penner Committee's emphasis on equalization was significant. With regard to provincial governments, the principle of equalization is constitutionally entrenched in Section 36 of the Constitution:

> 36. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the Government of Canada and the provincial governments, are committed to:
>
> a) promoting equal opportunities for the well-being of Canadians;
>
> b) furthering economic development to reduce disparity in opportunities; and
>
> c) providing essential public services of reasonable quality to all Canadians.
>
> (2) Parliament and the Government of Canada are committed to the principle of making equalization payments to ensure that provincial governments have sufficient revenues to provide reasonably comparable levels of public services at reasonably comparable levels of taxation.

The basic idea behind federal equalization payments to provinces is that each province in Canada should be able to provide its citizens with about the same level of public services for the same tax rates as in any other province. If tax bases (income, sales, property, and resources) are below average, and average tax rates bring in below average revenue, the federal government provides a grant to make up the difference between the revenues collected and required.

The application of the equalization approach was a fundamental part of the Penner Committee's approach to Indian government. Essentially, Penner put forward the proposal that federal financing of Indian governments be premised on equalization as determined through negotiation. It has been difficult, however, to determine the general acceptability to various interests of this approach to fiscal relationships. Discussions of the fiscal implications of the Penner approach have been missing from most evaluations of the report (as in the 1984 *Canadian Public Policy* symposium articles by Paul Tennant, Sally Weaver, Roger Gibbins, and J. Rick Ponting.)

There is much to say for the idea of applying the concepts of "equalization" and "negotiation" to the fiscal relationships between

Indian governments and the federal government. Equalization, to many Indian political leaders, represents the principle of "entitlement," that is, the tenet that Indian peoples and their governments have a right to federal fiscal transfers because of their aboriginal status and the prior injustices that have been committed against them in Canadian history. Furthermore, negotiation is seen by many Indian governments as the only way in which they are going to have the federal government actually address fiscal issues such as the adequacy of funding or the controls that are tied to it. The "bottom line" for most Indian governments is that they want some measure of satisfaction, as the result of mutually agreed upon funding levels. They want a good deal of flexibility in funding and the ability to do long-term budgeting. They contend that the ideas "equalization" and "negotiation" would go a long way toward providing such arrangements.

Penner recognized this, but the Committee's approach was too general to be a useful guide for practical solutions to the financial problems that characterize the relationships of the governments of Canada and Indian governments. The gap between the principle of a formula driven equalization approach and a bargained settlement as determined through negotiation, for example, could be very large. What is adequate equalization? And how close might various negotiated arrangements come to true equalization, whatever it may be? When fiscal issues are examined more closely, the concepts of "equalization" and "negotiation," as presented in the *Penner Report* without a significant amount of further elaboration, appear as nebulous solutions to problems that are more complex than was apparently recognized.

The lack of specifics on fiscal issues in the *Penner Report* was a result of the research approach used by the Committee. This approach was basically to solicit written and oral statements on Indian self-government. By far the vast majority of respondents were Indian people themselves, who documented, over and over, the problems of existing Indian policy. Not surprisingly, the strength of the report is its critique rather than its recommendations. This does not mean that the recommendations are wrong; in fact, they do go a long way toward establishing an appropriate framework for Indian government in practice. Unfortunately, however, less scrutiny has been given to the recommendations than the critique, and this is especially the case with the analysis of intergovernmental fiscal arrangements.

To build on the Penner approach, it is necessary to take into account the growing complexity and diversity of the revenue bases of many Indian governments. Reading the *Penner Report* and other analyses of federal fiscal relationships with Indian band governments (e.g. Malone) leaves the impression that virtually all band funds come from Indian and Northern Affairs Canada (INAC) allocations. This perspective is reinforced by the Penner Committee's acceptance and citation of the view of James Frideres, that "the comprehensive nature of the Department operations and funding in relation to band governments cannot be overstated":

> On the reserve, the IIAP (Indian and Inuit Affairs Program) is a 'total' institution in that it has a monopoly on the delivery of services to a captive clientele. Its organization is characterized by specialization, hierarchy, and regimentation, while its clients are uneducated, unspecialized, and varied. By limiting the choices available to its Native clients, the IIAP shapes and standardizes Native behaviour at minimal cost and risk to itself.

As discussions of service provisions by Indian government in the last chapter have illustrated, INAC simply does not hold the monopoly position commonly attributed to it. This is true in relation to service delivery and it is true in relation to financing. The federal government itself encourages a diverse approach to financing Indian governments as part of its overall effort to incorporate Indian governments into existing federal-provincial arrangements. Nor can its "Native clients" be characterized as uneducated or unspecialized. One band visited in the course of the research for this book, for example, pursues a sophisticated and complicated strategy of obtaining funds from many resources, deriving only two-fifths of its revenue from INAC in a given fiscal year. This, it should be noted, is an economically diversified band, not one possessing rich natural resources that could generate extra revenue. Nor is it unique.

INAC financial approaches do provide critical obstacles to band and tribal councils seeking to create Indian government in practice, but the Department does not "shape and standardize" Indian behaviour, despite more than occasional efforts to do so. In practice, many bands and tribal councils use a wide variety of strategies to draw creatively on many sources of funding. Important sources of non-INAC funds for band governments include other federal departments (Health and Welfare's Medical Services, Employment and Immigration, Canada Mortgage and Housing Corporation, Secretary of State, Environment Canada, and Fisheries and Oceans), the provincial governments, trust account earnings, and their own sources of revenue from leaseholds, band enterprises, and user charges for various services. In addition, with the new taxation amendments to the *Indian Act* in place, bands may generate additional revenues from the taxation of leaseholders or even their own members, if they so desire.

Provincial governments also play an important role in providing financial resources to Indian governments. Provincial government policies toward Indian people vary tremendously across Canada, with some provincial governments contributing much more to band financing than others. Manitoba, for example, provides the same general grant funds to bands as it does to municipalities, while no property taxes are collected on reserves. By contrast, in British Columbia, both local governments and the provincial government levy property taxes on reserve leasehold lands while providing less than 25 percent of the services provided to taxpayers paying the same taxes on nonreserve lands. In British Columbia no general grants are made to bands.

Economic development provides another important source of funds for some Indian governments. As far as economic development is concerned, it is an understatement to indicate that the economic bases, both actual and potential, of different Indian governments vary tremendously. Again, diversity rather than uniformity is the rule. Some reserves are of sufficient size and location that significant economic development is feasible. Others are remote, very small, and lack an adequate economic base.

Along with the diversity in potential, there are also significant barriers to the realization of the economic development potential of many Indian communities. Some of these barriers are institutional, such as band councils' lack of statutory corporate capacity, the inaccessibility of capital due to the legal status of reserve lands, and the taxation of reserve leasehold lands by non-Indian governments without comparable provision of government services. Other barriers are related to the cutting off of bands from traditional resources, such as forests and fisheries, which are not contained within reserve boundaries.

Many Indian governments have carefully cultivated their economic development potential as well as their relationships with other federal departments, provincial ministries, local governments, and even private foundations, specifically to get away from INAC's potential financial monopoly. Many Indian governments (including their nonprofit societies and corporations) have done this successfully. There has been also considerable diversity in their willingness to levy user charges or taxes on their own members.

The net result of the diversity of the funding arrangements that underlie the movement towards Indian self-government is that some Indian governments possess considerable discretion in policy-making, as they supplement INAC funded services and undertake activities of their own choosing, especially when their "own source" funds are significant. Indian governments are, in this sense, involved in true self-government decision-making. In contrast to Indian governments that have developed diverse revenue sources, there are others that receive over 90 percent of their revenue from INAC. Since INAC rules provide only minimal scope for band decision-making, fiscal constraints limit the opportunity for these governments to exercise a fuller degree of Indian government in practice.

The Penner Committee perspective on financing Indian governments is a good starting point. Equalization and negotiation over funding are important principles, but these principles need to be understood within the context of diversity as they are translated into practice. In general, there is considerable diversity in the financial resources, range of services, quality of services, and the way services are provided on Indian reserves by band governments. In particular, it is critically important, when assessing Indian fiscal relationships with other governments, to consider the diversity of funding and service delivery relationships some bands have been able to develop. Such diversity may be a key lever for Indian governments attempting to achieve full recognition in practice as well as in principle.

## Emerging INAC Approaches to Financing Indian Government

The federal government has provided little evidence that it is willing to fund Indian governments on the basis of an equalization approach. It has indicated some interest in moving from a purely formula-driven approach to one that is based on negotiations with Indian governments, and it has moved, in a small way, to enable Indian bands to use taxation powers to raise revenue from their own sources. These indications provide some basis for understanding the emerging approaches INAC is taking to financing Indian governments.

Negotiated financial agreements related to special legislation or land claims settlements are one of the federal government's more substantial approaches to the challenge of financing Indian government. Three negotiated agreements involving the federal and Indian governments in such circumstances have been reached. These agreements are with the Cree-Naskapi peoples of Quebec, the Inuvialuit in the western Arctic, and the Sechelt people in southern British Columbia.

The most recent agreement is the *Sechelt Financial Agreement*, and it is the one that will be treated here. (The Sechelt case in general will be treated in much greater depth in the next chapter.) The *Sechelt Financial Agreement*'s financial provisions (Schedule A) are very brief. They consider only INAC direct funding for five categories of expenditure, and are based on the previous year's funding of those activities by INAC. The rest of the agreement specifies formulae for annual grant changes based on population and cost changes for five years. While it is impossible to tell just what account, if any, was taken of other federal agency funding or the Sechelt Band's own revenue raising capacity, it is clearly stated that: "Since funding from other Departments is not included in the base, this Agreement does not preclude the Band from entering into similar Agreements with other funding agencies." The arrangement also does not preclude entering into additional agreements directly with INAC.

There are two important aspects of the *Sechelt Financial Agreement*. One is that across four of the five categories of funds specified (administration, local government infrastructure, social assistance, and economic development), the band may allocate funds as it sees fit — subject only to budgeting and auditing requirements. Funds in the fifth category (education) are restricted to that purpose. This is a notable fact. Even in this exceptionally simple agreement, a single block grant arrangement could not be negotiated for five INAC programs, let alone take account of other federal programs. The other significant aspect of this agreement is that the amount of funding is specified, with cost and population escalation clauses, for five years. At the end of five years the agreement is to be renegotiated, and it is specifically noted that the band's economic development, fiscal capacity, and revenues can be taken into account at that time.

It is difficult to determine just what directions the *Sechelt Financial Agreement* indicates INAC is moving in, as the agreement reflects a somewhat unique evolutionary process of self-government, where other aspects of Sechelt governance and property relationships are potentially more important, including relationships with the provincial government. It may be, however, that the Sechelt agreement provides a foretaste of things to come, as the federal and Indian governments arrive at a series of agreements that are customized to reflect special relationships between the federal government and Indian governments. This possibility as much as the specific aspects of the Sechelt Financial Agreement may be a significant indicator of the emerging fiscal patterns underlying the evolution of Indian government in practice.

The Sechelt agreement is not based on an equalization approach, and in that sense it is a departure from the kind of fiscal arrangement for which many Indian governments have been calling. It is based upon a serious approach to the negotiations, however. Another recent INAC initiative represents an even further departure from the principles of equalization and negotiation, but it still may be seen as a step in the direction of negotiation. This initiative is aimed at enabling band governments that operate under the *Indian Act* to be more responsible for administering their own services. It is called the Alternative Funding Arrangements (AFA) initiative. AFA was developed in 1986, partially in response to the *Penner Report*. The basic elements of AFA are very simple. It is not too different from the Sechelt financial arrangement. It is available, under INAC-designed conditions, to bands and tribal councils, when the latter are authorized to act, for such a purpose, on the part of a set of bands. If a band or tribal council applies and is considered qualified, it may negotiate and receive a five-year funding agreement to provide services.

When AFA is compared to previous INAC fiscal arrangements, there is a new element of flexibility. The funding agreement, for example, can be for five years instead of one. Funds, with some restrictions, can be moved from one budget line to another, for example, from social development to education. As part of AFA, Indian governments must meet an obligation to maintain INAC agreed-upon service standards, and not all INAC funded activities are included. For example, child welfare, business development, resource development projects, and larger capital projects are still subject to separate INAC decisions and arrangements with bands and, in some cases, provincial governments.

AFA also includes new obligations for Indian governments. First, to qualify for AFA funding a band or tribal council must have participatory governing and administrative procedures satisfactory to INAC. The details of these requirements are, to a significant extent, left up to the INAC regional offices. This provides an opportunity to recognize the diversity among Indian governments, especially those that use customary rather than *Indian Act* electoral processes. It is easy for bureaucratic processes to become overly specific, however, and if Indian governments had to meet the conditions of the assessment processes currently in place, for example, they would have their administrative processes specified with a degree of detail that far exceeds the regulations other governments impose upon themselves. For smaller band governments to follow such procedures would not only be extremely difficult, it would often be inappropriate.

In addition to the approval of participation, governance, and administrative detail, the Indian governments taking part in AFA have to follow procedures in the *AFA Audit Guide* for annual audits of their finances. This guide also recommends that audits be expanded to include program output measures. These measures are actually described as a "reduction" in reporting requirements. Such an audit would provide Indian governments with much better information for decision-making than is currently possessed by most local or provincial governments, but it would also take much time and energy from relatively small and service-oriented governments. In recognition that these audit requirements can be a significant burden, the AFA with the Nuu-chah-nulth Tribal Council in British Columbia, for example, includes an extra $15,000 annually to assist with audit costs. Out of a total budget in excess of $11 million annually, $15,000 is a small sum, given the requirements imposed. Finally, AFA must be introduced within existing funding levels, so that Indian government revenues neither increase nor decline as a consequence of entering into an AFA agreement.

At present it is not clear how widespread acceptance of AFA will be. One barrier to acceptance is that many Indian governments view the initiative as simply a different kind of federal government funding control and not necessarily as a reduction in control. A second barrier may prove to be more important. Since entering AFA itself cannot result in a funding level change and since the funding commitment is for several years, many Indian governments maintain that acceptable funding levels must be negotiated under old arrangements before they will consider AFA. For example, a band government that appears to meet AFA criteria but currently receives a road maintenance allowance for twenty-two miles of roads instead of the thirty-five miles it actually maintains may not want to apply for AFA until this funding deficiency is remedied. Many small remedies of this kind are beyond INAC's current budget.

Indian governments continue to experience problems as they seek to establish their financial bases. As they do so, they may increasingly be forced to look to generating revenues outside of fiscal agreements with other governments. Taxation is one way that a government can generate additional revenue. INAC clearly recognizes this to be the case. In 1988, the *Indian Act* was amended with regard to band taxation authority and control over reserve lands that have been leased to non-Indians. The amendments are interesting because they were promoted by Indian people, especially Chief Clarence

Jules of the Kamloops Band, and were announced as quite significant. However, a closer look indicates they did not resolve the original problem Chief Jules set out to resolve, and the amendments were relatively minor.

The original problem underlying the proposals for taxation amendments arises primarily in British Columbia, where the provincial government in rural areas and local governments having reserves within their boundaries levy property taxes on leasehold lands on Indian reserves. There are forty-five reserves within twenty-six municipal boundaries in British Columbia. These governments often do not provide any services to the leasehold lands. In fact, municipalities provide approximately 25 percent of the services to leasehold lands that they provide to other municipal taxpayers (Bish, 1987). Leaseholders resent paying taxes for which no services are received, and the levying of these taxes reduces the value of the leaseholds to Indian governments undertaking the leasing. Chief Jules hoped to end the levying of the provincial rural property tax on leaseholds in the Kamloops Band's industrial park, so that the band could raise lease fees accordingly and finance the public services necessary for the industrial park.

The tax amendments did not accomplish this objective because they did not affect in any way the ability of any other government to levy taxes on leasehold lands, even if that government chooses to provide absolutely no services to those taxpayers. What the taxation amendments did do was to extend to all band governments the authority to levy their own property taxes, a power formerly limited to those bands designated as having "reached an advanced state of development" under Section 83 of the *Indian Act*. This also must be seen as a limited achievement. The amendments specified procedures that must be followed to enable bands to enact property taxation legislation, but those provisions are no different, for example, than those contained in the Alexander Band's property tax bylaw, enacted under Section 83.

The second objective of the taxation amendments was to clarify in statute what the courts have already decided: that non-Indian governments cannot regulate such things as land use or zoning on reserve leasehold lands, and that bands may regulate those lands. The legislation clarified that leasehold lands remain part of reserve lands, even though they may be occupied by non-Indians.

This overview of recent federal approaches to financing Indian governments indicates that these approaches have not kept pace with the aspirations of Indian peoples and their governments, and that they are inappropriate in the light of the activities of these governments. As Coopers and Lybrand concluded in their analysis of band financing for the Penner Committee, INAC funding of band governments is encumbered by rules of procedure and required service standards, which neither assure effective INAC control nor promote Indian self-government. This is still the case. To a large extent, the Penner Committee recommendations have not been adopted. The 1988 taxation amendments to the *Indian Act* add few new powers to those of *Indian Act* band governments. AFA is not the kind of block funding recommended by the Penner Committee. The Sechelt Agreement and INAC's AFA program introduce flexibility and multi-year grant agreements. AFA also introduces or perpetuates new governance, service standards, and program audit requirements that could be seen as stifling Indian governments rather than assisting them in their drive for more self-government. The Sechelt agreement is tied to special legislation that many Indian people believe is an attempt to bypass the question of Indian government at the constitutional level. This they will not accept.

## Four Critical Financial Questions

The practice of Indian government finance in relation to the federal government is reasonably well understood, although the diversity of revenue sources Indian governments have developed is not always recognized, and the outcomes of negotiated agreements and AFAs are too new to fully evaluate at this time. It is clear, however, that dissatisfaction with band government financing practices on the part of INAC is widespread. There remain many problems for which solutions are needed. This is particularly true of funding at the band level. For the purposes of this study, the practice and evolution of Indian government finance must be evaluated in terms of four sets of questions.

1. *What incentives do Indian government decision-makers face in expenditure decision-making and to whom are they accountable?*

The ideal decision-making incentive system for a government is one where decision-makers are directly responsible to their constituents, who in turn both benefit from and bear the costs of decisions, and where the decision-makers have a wide range of potential choices. Such an arrangement encourages citizens to pay attention to the actions of decision-makers, and if decision-makers want to be re-elected they pay attention to providing the highest net benefits to their constituents. Unfortunately, current Indian government financing is not done within such an arrangement. While band members, for example, may elect their chief and council, INAC provides funding for specific line-item activities. If amounts are not spent they cannot be shifted to other activities or carried over to the following year. Thus, decision-makers have no real discretion to allocate resources to activities on which band members may place a higher value, and there are few incentives to be efficient.

Another problem that relates to incentives is that the funds for band activities often come directly from INAC or another government department, and band members frequently do not realize the costs of the services provided. The net result is that in such situations band members have no incentive to pay close attention to the decisions of their officials. Officials do not have a wide range of choice, and it is very easy for band officials to blame INAC for excessive rules or insufficient funding if members do voice dissatisfaction with decision-maker performance. This is not a set of institutional arrangements that one would anticipate would lead to the efficient use of resources or the satisfaction of band members over time. It does not closely approximate self-government.

Negotiated financial agreements (such as the Sechelt agreement) and the AFAs do provide for an improvement in incentives. When these agreements are in place, a chief and council have wider discretion over how funds are spent, and if they can be more efficient, they can use any savings to undertake other activities or save them for subsequent years. In this respect, the negotiated and AFA agreements significantly alter, in a way that is consistent with a fuller exercise of Indian government, the incentives decision-makers face. But, as outlined above, these agreements, particularly AFA, present problems as well as possible solutions.

### 2. *What role should equalization play in the financing of Indian self-government?*

The *Penner Report* and many First Nation documents refer to "equalization" as a principle applicable to the funding of Indian governments. This concept is often used in a broad and undefined manner. As noted earlier, for many Indian people it is related to the federal government's fiduciary obligations to Indian peoples and their entitlement to fiscal transfers from the federal government. As normally understood in the Canadian federal system, the principle of equalization has several important elements. One is that it is clearly income and wealth related; another is that equalization payments, as constitutionally applied to the provinces, are an entitlement, not a federal payment that involves any federal ministerial responsibility or control. There are absolutely no specified service conditions, participation rules, or administrative processes imposed by the federal government on provincial governments as a condition of their receipt of equalization payments. Provincial governments, for example, do not actually have to raise tax revenues at national average rates to be entitled to equalization grants.

Still another important element of equalization is how it is financed. Funding is from federal government revenues, which include individual and corporate income taxes, sales and excise taxes, and a variety of other sources. In effect, equalization transfers funds from taxable individuals and corporations to provincial governments. This aspect raises questions about the tax treatment of individual Indians, which will be addressed below.

The application of specific elements of equalization to First Nation governments—the income and wealth base, the freedom to make one's own expenditure decisions, and financing from taxes on individuals and corporations—comes up against several major problems. There is considerable diversity in the wealth of individual Indians and Indian bands, and in the potential for economic development on Indian reserves. While equalization is an appealing principle, there needs to be consideration of the current income or wealth of either bands or individual band members. To understand whether or not the principle of equalization—based on the analogy to federal equalization payments to provincial governments—should be a desired objective, it is useful to look at its full implications.

If equalization were to be treated as an important principle of First Nation financing, the existing income and wealth of First Nation governments would have to be calculated just as it is for every province, even if a particular First Nation government chooses not to actually levy any taxes upon that income or wealth. The minimum steps that would be necessary to develop equalization-based fiscal transfers for Indian governments are the following:

a) an estimation of the current tax base for property taxes, sales and excise taxes, individual and business income taxes, and royalties;

b) an estimation of the amount of revenue the First Nation would receive if tax rates used by Canadian provincial and local governments were applied to the First Nation tax base;

c) a comparison of the amount of revenues that would be received from the use of average tax rates within the First Nation with the revenue that would be received if the First Nation's wealth and income were equal to the Canadian average. The difference would provide the first estimate of the size of equalizing grant the First Nation should receive in order to provide services at about the same level as other citizens of Canada receive; and

d) following this estimate, additional adjustments would have to be made to account for the division of functions decided upon between the First Nation, provincial, federal, and local governments.

An indication of the steps required is necessary to illustrate the logic of equalization as it is used among the provinces. If equalization were introduced as a true grant from the federal to Indian governments, First Nations could determine their own priorities and procedures for spending equalization grant funds, just as provincial governments do, but implementing an equalization-based formula would be difficult.

A movement toward equalization, taking into account the wealth of bands and band members, has been introduced both directly and indirectly, to a very limited degree, into negotiated agreements and AFAs. These agreements explicitly indicate that wealth and fiscal capacity will be considered in negotiations over renewals every five years. In addition, however, the initial amounts are based on what expenditures would be, given the current status of band members. This provides for larger payments to bands with a large number of economically dependent individuals. For example, $2,689,300 of $8,574,100 operating funds are for social assistance in the Nuu-chah-nulth AFA, and $922,254 of $1,376,686 are for social assistance in the AFA of the Westbank Band in British Columbia. To the extent the bands are able to reduce economic dependency in the short run, they may use freed-up social assistance funds for other purposes, but when the agreements come up for renewal their total grants may be reduced.

At present, one should anticipate a continued movement toward taking into account a band's resources in negotiated agreements, such as in AFA agreements, but it is unlikely there will be a full-fledged movement toward equalization if current federal policy is assumed to continue.

3. *How do individual Indians relate to the Canadian system in regard to finance and taxation?*

Individual Indians have unique legal status in the Canadian system. This status permits them to be exempt from taxation by other governments. Major tax exemptions to status Indians include the following (Ernst & Whinney):

a) Salaries and wages are exempt from federal and provincial income taxes if the income is earned on a reserve, or if the employer's principal place of business is on a reserve;

b) Rent, interest, dividends, or other sources of income are exempt from taxation if they are earned on a reserve;

c) Business income is exempt if the business is located on a reserve. But corporations, even if owned by Indians, do not qualify because corporations are not status Indians;

d) Indians are exempt from sales taxes if the purchase is made on a reserve; and

e) Indians are exempt from property taxes if the property is located on a reserve.

These tax exemptions are provided for in the *Indian Act* and its court interpretations, and in some cases, in treaty agreements.

The tax exemptions are utilized primarily by reserve-based Indians, and their precise magnitude is hard to determine. This is because many Indian people, even those residing on reserves, are employed and shop off their reserve, paying all federal and provincial income and sales taxes. Two consequences of the tax exemptions are apparent. The exemptions do provide advantages for locating businesses on reserves, and in this respect they contribute to economic development. The long tradition of tax exemptions, however, has reinforced the idea among Indians that they should not have to pay taxes. This has made it difficult for Indian governments to tax members in order to help finance activities—even where the activities contribute to the business success of the community.

4. *Who is really responsible for financing Indian governments? How do aboriginal rights relate to this issue?*

Self-government implies control over financial as well as other resources. Aboriginal rights imply not only the right to self-government but also an entitlement to financial and other resources provided by the Canadian Government as compensation for violations of aboriginal rights and title or actions that impede the ability of Indian people to take advantage of them. This, in turn, implies that the Canadian Government has responsibilities for funding Indian government. Aboriginal rights is a concept that varies in content for different people, but it is critically important to understand the way many Indian people conceptualize aboriginal rights and the fiscal implications that follow from their conceptualization.

A popular Indian way of explaining the fiscal implications of aboriginal rights is the landlord-tenant analogy (Indian Tribes of Manitoba, Prairie Treaty Nations Alliance). In this analogy the original Indian inhabitants owned Canada's lands and resources long before the coming of European colonists. In exchange for sharing the use of Canada's lands and resources, many First Nations assert that they should be paid rent, just as a tenant pays rent to a landlord. Those who hold this perspective often also place considerable emphasis on the moral legitimacy of their position and emphasize not only what they consider to have been the unfairness of the treaty-making process, but also the failure of Canada to follow provisions of treaties once made.

One dilemma that the aboriginal rights/landlord-tenant analogy poses as a basis for fiscal transfers is that there are no guidelines for what level of funding would be required to compensate First Nations for sharing their land and resources with successive generations of immigrants. Modern treaties may provide some guidelines for a particular settlement, but it is likely that settlements will continue to be proposed more on the basis of recent federal policies concerning compensation and other matters, than on any landlord-tenant analogy. It would appear possible, however, to combine the concept of aboriginal rights with some kind of equalization-based calculations to determine the actual fiscal transfers the federal government might make to appropriately support First Nations self-government. These calculations could either be partial, by focusing just on public service expenditure levels, or more comprehensive, by including measures of Indian government income or wealth.

## Recognition or Paternalism

The direction indicated by the recent fiscal agreements between the federal and Indian governments, the Alternative Financial Arrangements Initiative, and the promotion of economic development in Indian communities is toward increased responsibility for Indian governments and is consistent, to a degree, with movement toward self-government. Further progress toward a fuller form of Indian government in fiscal decision-making is going to depend on choices between two very different kinds of federal policies as well as on the initiatives of Indian governments.

Current federal policy concerning Indian peoples and their governments is based on the paternalistic assumption that the federal government is "responsible" for Indians. In the extreme, this attitude rests upon a particular application of the principle of ministerial responsibility to the exclusion of other important principles, such as self-government by First Nations citizens. While ministerial responsibility remains the central principle underlying the federal government's approach to Indian government, the Government of Canada will tend to hold a perspective that effectively reduces the possibility of fuller Indian government as projected by many Indian people and their governments. The doctrine of ministerial responsibility requires that a responsible minister sets the mandate, authorizes the required resources, and ensures that he or she is provided with the information required to be held to account to Parliament concerning the probity, economy, efficiency, and effectiveness of the activity. Such an approach is difficult to reconcile with fiscal self-government.

A federal policy that would contribute to fiscal self-government would be based on recognition and accommodation rather than paternalism. Even under existing constitutional arrangements, the government could move forward to create the institutional and legal environment where Indians could achieve economic development and manage their own affairs, to a significantly greater, if not fully acceptable, degree. This policy would include such measures as granting Indian governments corporate status, extending tax exemptions to Indian-owned corporations operating on reserves, moving towards equalization through intergovernmental grants, and eliminating taxation of reserve lands by other governments without Indian government agreement. Such an approach on the part of the federal government would have as its objective a clarification through legislation of the legal structure of Indian governments so that Indians can go on with their own business.

Such a policy would enhance the efforts of Indian people and their governments to achieve a fuller form of Indian government. It would be entirely possible within current constitutional arrangements, and, if the federal government was clear and convincing that it was not a substitute for constitutional change, it might even be greeted in a positive way by many Indian governments. The federal government could take this course. Not to do so could be viewed as a failure on the part of the federal government to carry out its responsibilities in relation to Indians and to take what are really very small and quite constitutional measures to accommodate Indian government as it emerges from the initiatives of Indian peoples in Indian communities.

# PART III
# Future Directions

# 7

# Self-Government Arrangements

Starting with the James Bay and northern Quebec comprehensive land claims agreements in the mid-1970s and proceeding with its "community-based negotiations" program and special legislation in recent years, the federal government has moved to accommodate and rationalize Indian government within the federal-provincial system. It has done so through the establishment of comprehensive self-government arrangements to develop special legislation for specific Indian governments. Through such arrangements, the extent of the jurisdictional powers of Indian governments and the relationship of these governments to other governments are laid out. In contrast to the course by which Indian self-government has developed in practice over the past twenty to twenty-five years, this approach deals with major questions as a preface to working on more specific ones. By comparison, to date most of the progress that has been made in relation to very specific matters has been made in the context of general disagreement on wider ones. This departure has led both the federal government and many Indian governments to be cautious about the very comprehensiveness that is seen as the key advantage of the newer approach.

With the possibility of more comprehensive land claims agreements in coming years and with INAC's introduction of the community-based negotiations program, the comprehensive arrangements approach is likely to become much more common in the future. The two most prominent examples are the Sechelt initiative, a process centred on the creation of special legislation, and the James Bay Cree land claims agreement and associated special self-government legislation.

## The Sechelt Initiative: Towards Municipal Style Government

The federal *Sechelt Indian Band Self-government Act* came into force in October 1986. Approximately nine months later, an accompanying piece of legislation, the *Sechelt Indian Government District Enabling Act*, was proclaimed by the Province of British Columbia. The sequence was not accidental. Holding to its traditional stance that Indians and Indian lands are a federal responsibility, British

Columbia maintained a strong interest but did not actively participate as a partner in the negotiations between Sechelt and the federal government. Rather, it waited until these negotiations reached a successful conclusion and then began to negotiate an arrangement that would allow Sechelt to proceed with a municipal style of government, on the basis of delegated federal and provincial powers (Taylor, 1987).

While the federal government has maintained that the Sechelt initiative is not to be considered as a prototype for other bands to emulate as they move toward self-government, in many ways Sechelt is a model for the exercise of a kind of self-government that is based on legislatively delegated powers, a partial elimination of the role of the *Indian Act*, and the further evolution of Indian governments as municipal-style governments within the current federal-provincial system.

The Sechelt initiative needs to be understood in the context of the specific and somewhat unusual characteristics of the Sechelt Band itself and the dynamics of the intergovernmental setting in which its government is located (Taylor & Paget). The band is located on the Sunshine Coast, just west of Vancouver. This region is physically attractive and is marked by rising land values. The band's reserves include over 2,500 acres of land, much of which has very good development potential. Relative to most Indian bands, the band has a high level of economic development. Seeking further development, the Band felt for many years that restrictions in the *Indian Act*, what it perceived as undue interference and sometimes incompetent management on the part of INAC, and the lack of a stable and clearly defined relationship to the provincial government all combined to make it difficult to achieve the Band's goals. This resulted in the Band's desire for new arrangements.

The federal *Sechelt Act* does not give Sechelt constitutionally based self-government. It is, however, enabling legislation providing the Band with the authority "to exercise and maintain self-government on Sechelt lands and to obtain control over and the administration of the resources and services available to its members." As a result of the Act, Sechelt has the delegated federal authority to negotiate with the federal or provincial governments specific agreements concerning a variety of governing functions. The powers and duties of the Band are to be carried out in accordance with its constitution, a written document accepted in a referendum by a majority of electors and then approved and declared in force by the Governor in Council.

With the *Sechelt Act*, the *Indian Act* Sechelt Band ceased to exist, and all of its rights, titles, interests, assets, obligations, and liabilities were vested in the Sechelt Indian Band. The *Indian Act* continues to apply to the Band, its members, the Council, and Sechelt lands, except where it is inconsistent with new legislation, the constitution of the Band or a law of the Band. Specifically, the *Indian Act* applies for the purpose of determining which members of the Band are "Indians" within the meaning of that Act. Consequently, Sechelt members retain their status as Indians and their eligibility for the benefits of this status, including freedom from certain kinds of taxation. All federal laws of general application are applicable to the Band, its members and lands, except to the extent that they are inconsistent with the *Sechelt Act*. Two specific pieces of federal legislation also continue to apply to the Band: the *Indian Oil and Gas Act* and the *British Columbia Indian Reserves Mineral Resources Act*.

For Sechelt, its constitution is the key to its self-government powers (Allen, 1986). It establishes the composition of the new Sechelt Indian Band Council, the terms of office and tenure of its members, and procedures relating to their election. It sets out the procedures or processes to be followed by the Council in exercising its powers. It provides for a system of financial accountability for the council, includes a membership code, and establishes the rules and procedures to be followed in the disposition of the rights and interests in Sechelt lands. It also sets out the specific legislative powers of the Council, selected from among "the general classes of matters" set out by the federal government in its *Sechelt Act*. After the passage of the Act, the Band moved quickly to pass its constitution.

As a result of the federal *Sechelt Act*, the Sechelt Band is a legal entity, capable of entering into contracts, acquiring and holding property, expending or investing moneys, borrowing money, and suing or being sued. The Band is also granted fee simple title to all of its reserve lands, along with full power to dispose of these lands in accordance with its constitution, which requires that the membership approve by referendum any attempt to do so. Section 14 of the Act describes the powers that the Council may exercise.

The Band can make laws in relation to twenty-one classes of matters, including, among others, access to, residence on, zoning, and planning in relation to Sechelt lands. It may expropriate for community purposes interests in these lands, and it can make regulations governing building on them. The Band also has responsibility for education, health services, testate or intestate succession, public order and safety, as well as social and welfare services, including the custody and placement of children of Band members.

It may act to preserve and manage natural resources and fish and wildlife and to regulate commerce on Band lands. One of the most important provisions of the Act gives the Band the authority to make laws in respect of "taxation, for local purposes, of interests in Sechelt lands, and of occupants and tenants of Sechelt lands in respect of their interests in those lands" (Section 14-e). Another provision grants it the broad authority to make laws on "matters related to the good government of the Band, its members or Sechelt lands" (Section 14-u).

The relationship of the Sechelt Band to the provincial government is framed to some extent by the federal legislation. Under Section 15 of that legislation, the Band may exercise any legislative powers granted to it by the provincial government. A law of British Columbia may be adopted by the Council as its own law if the provincial law falls within an area in which the Council may legislate. Laws of general application within British Columbia apply to the members of the Band, except to the extent that those laws are inconsistent with any treaty, or with federal or Sechelt legislation.

The provincial Sechelt legislation recognizes the Band Council as the governing body—as the "District Council" of the Sechelt Indian Government District—and ensures that selected provincial laws and benefits normally applying to municipal governments apply to it. Thus the Band Council assumes a different name but continues to govern under provincial as well as federal law.

The activity permitted under the Sechelt Band Council's jurisdiction is much wider than that of *Indian Act* bands. Sechelt is not subject to a power of specific disallowance on the part of the Minister of Indian Affairs or any other federal authority. It has broader taxation powers as well as the authority to govern the child welfare of Band members and the natural resources on Sechelt lands. It has authority over testate or intestate succession of real and personal property of band members. Moreover, the "good government" provision of the federal legislation gives it a potentially broad area of authority. Interestingly, it does not have the same authority as do *Indian Act* bands to control and prohibit public games, sports, races, athletic contests, and other amusements. Given recent efforts by many bands to independently license bingo games and provincial government opposition to such initiatives, this is undoubtedly not an accidental omission.

Sechelt jurisdiction may be exercised in relation to a wider variety of individuals than may the jurisdiction of *Indian Act* bands. The Sechelt Indian Government District, empowered by delegated jurisdiction on the part of both the federal and provincial governments, has jurisdiction over all Sechelt lands and is governed by the same council as the Band. The Council may exercise control over non-Indian lessees on Sechelt lands. Because of this provision, Sechelt has much more explicit authority over non-Indians on its lands than does any other Indian government in Canada (Taylor & Paget).

Due to the location and value of Sechelt lands, there is an unusually high number of non-Indian residents living on them. In fact, the number of non-Indians is approximately equal to the number of resident Band members. Any scheme for self-government in such a circumstance must provide for a very specific governing relationship between Indians and non-Indians. The provincial legislation establishes an Advisory Council to represent all the residents of the district, this Council to be appointed by and subsequently elected under the authority of the Lieutenant Governor in Council. The legislation also provides for the phasing out, under certain conditions, of provincial taxation of non-Indian occupiers of Band property in favour of district-imposed taxes to provide local services. As Graham Allen, Sechelt's legal adviser, explains:

> What has essentially happened here is that the Sechelt Band Council has gone to its non-Indian residents and said: "We're going to create a form of government for all the residents with which you will be familiar. This has nothing to do with our Indian government.... It is merely a way of dealing with the fact that non-Indians are resident on our lands and must be accommodated in a fair, reasonable manner." (Allen, 1988)

To protect the control of Sechelt members over their own lands, the provincial legislation provides that this accommodation between Sechelt and non-Indians be institutionalized in the Advisory Council, a body of resident nonmembers which is to advise and work with the District Council, that is the Band Council, the body that represents only Sechelt Band members. By the establishment of this relationship as well as the powers delegated to the Band from both the federal and provincial governments, the Sechelt Band is in a considerably stronger position to pursue community planning and development in a more orderly, productive, and relatively unencumbered manner than are *Indian Act* Bands. This is one of the most meaningful accomplishments of the Sechelt legislation.

The intergovernmental dimension of the Sechelt initiative is the basis for much of the criticism and hesitancy which has been expressed by other Indian governments and organizations about Sechelt as a model for self-government. Many Indian people have questioned the federal and provincial goals in relation to the arrangements. They argue that the province and Canada have succeeded in "normalizing" Sechelt within the British Columbia municipal government system as a junior form of government rather than a third level of government with an independent jurisdictional base. They further maintain that such an approach is part of the strategy to demonstrate that the fullest possible form of Indian government can be achieved without constitutional entrenchment and, in the case of British Columbia, without comprehensive land claims agreements. On the part of the province, these goals appear to be clear, if sometimes unstated. As John Taylor and Gary Paget have noted:

> The Province's objectives in facilitating local self-government for the Sechelt were in direct relationship to the stance the Province was taking on Native/provincial fiscal relations, Native land claims and the question of constitutional entrenchment of the right to self-governance. The Sechelts provided the Province with an opportunity to demonstrate at the Band level what it was attempting to achieve in its overall provincial policy. Specifically it wished to demonstrate that self-governance could be achieved without the necessity of constitutional entrenchment. Moreover it has seen the Sechelt as a model that can form the basis for self-government proposals and initiatives from other bands across the province. It is also clear that a provincial objective was to set a precedent for resolving Native grievances through self-government rather than through the framework of comprehensive land claims settlements. The Province's objective was to signal to other Bands its willingness to discuss self-government rather than land claims.

The federal government has been perceived by Indian leaders as being much more evasive in its approach. David Crombie, upon introducing the bill for second reading in the House of Commons, maintained that the initiative is an example of the federal government's approach to self-government. "Instead of making communities fit our legislation," he suggested, "we will make legislation that fits the community." (INAC, April 19, 1986). In the *Sechelt Act*, the federal government followed this course to some extent. The Sechelt community had a significant role in drafting the bill and strongly approved of it, but it is also the case that the federal government was careful, very careful, to make sure the community "fit" the framework of the Canadian federal system as it is presently structured. To many, this is the great accomplishment of the Sechelt initiative. To others, this is its greatest drawback.

The Sechelt initiative is a specific one. It applies only to Sechelt, but it also has general implications for Indian peoples and their claims to the right of full Indian government. Section 3 of the federal

*Sechelt Act* makes it clear that nothing in the Act is intended to affect the status of the aboriginal rights of the Sechelt or any other aboriginal peoples of Canada, under Section 35 of the *Constitution Act, 1982* or through treaty. Technically, this is the case. In practice, for those who argue that Indian government is government based on inherent rights and jurisdiction, it is a contestable conclusion. The Sechelt initiative may indeed be part of an effort by the federal and provincial governments to reframe the issue of Indian government so that it becomes an issue of how to fit Indian governments into the current federal-provincial system as governments with enhanced municipal-style powers, rather than as governments with inherent powers operating in a special and somewhat equal relationship to the federal and provincial governments.

The Sechelt approach is based on delegated powers. Moreover, it is based on a strategy which, to a significant degree, detaches land and treaty matters from self-government issues. The Sechelt, as do most Indian peoples in British Columbia, have an outstanding land claim. The legislation is not supposed to affect the claim, but it does separate the process through which it may be resolved from the self-government process. In this spirit, Graham Allen writes that, "the Sechelt Band is in a position to exercise complete self-government for its own people" (Allen, 1988). It is such claims that fuel much of the criticism of the Act, particularly when they are juxtaposed against statements by the province that constitutional entrenchment is totally unacceptable while the Sechelt arrangements "point the way."

Detachment of community self-government issues from land claims and aboriginal rights issues may be the policy of the federal government and some provincial governments, but it is not the policy of many Indian governments in Canada. As the Union of British Columbia Indian Chiefs (February 20, 1987) maintains, for instance:

> It is important to note the language used in the legislation for "Sechelt Self-government" because the legislation states that the Indian community's government has been restored. It has been indeed restored, but under an artificial government process.... such authority is a far cry from the distinct order of government that was recommended in the *Penner Report*. ...[Sechelt self-government is] a form of self-government which has no Indian government roots at all.... Perpetual vulnerability is the quicksand upon which Indian people will be standing if they choose the municipal model of Indian self-government. A municipal government is not a distinct order of government. It does not have exclusive jurisdiction.... It is a creature of the senior level of government that created it and it can be limited or destroyed by its creator with impunity.

In the opinion of most Indian governments, land and aboriginal rights matters cannot be detached from those relating to self-government. An effort to do so may indeed be seen as an effort to solve the land issue — as well as the issue of the inherent right to self-government — by reframing it as a much more narrow and "pragmatic" matter, as a matter of local government, of municipal government, rather than as a matter of constitutional affairs, of aboriginal rights and title, of First Nations government.

Such a critique of the Sechelt legislation is consistent with the assertion of an inherent right to self-government, but it is just one important aspect of assessing the Sechelt legislation. It does not place the initiative within the context of Indian government as it has been developing in practice through the efforts of Indian peoples. From this perspective, it could be postulated that the Sechelt arrangements are no more a denial of the right to self-government than are the operations of *Indian Act* band councils and their existing relations with federal and provincial governments.

Indian government frequently involves an effort to proceed on two levels at once: to articulate the need for a recognition of the right to inherent jurisdiction on the part of Indian governments and, at the same time, to pursue a variety of arrangements based on delegated federal and provincial powers. Such a strategy enables Indian governments to provide necessary services to their members in practical ways while the larger issues of aboriginal rights and title are being sorted out. If this strategy is considered, the Sechelt initiative may be seen as one that is an extension of the normal evolution of Indian government in practice.

The practice of Indian government has demanded a pragmatic and, to some extent, opportunistic approach to matters such as local service provision, health, education, housing, social services, economic development, and natural resource management. As Indian governments have charted their courses to fuller autonomy, they have been forced by the realities of the present federal-provincial system to take such an approach. So, for example, while most Prairie bands and tribal councils do not accept the idea that they should have a government-to-government relationship with provincial governments, these Indian governments also recognize the need to gain some control over and to design as well as deliver better government services for their communities. As a result, they have entered into many limited arrangements with the provincial as well as the federal governments.

The Sechelt initiative could be seen as just one more example, albeit more highly publicized and more comprehensive, of an

Indian government seeking to improve its ability to get on with the business of governing in a practical, everyday way. Perhaps its comprehensiveness is part of the problem, however. The Sechelt arrangement is much more comprehensive than other agreements between Indian and other governments. Its very comprehensiveness may give it more of the appearance of being a solution-in-principle to the dispute over the constitutional role of Indian government than it may actually be.

The positive aspects of the Sechelt initiative should not be obscured. The Sechelt Band has played a very significant role in determining and designing its relationship with the federal and provincial governments. Members of the band have not lost their rights as aboriginal people or as status Indians. The federal government's fiduciary obligations are maintained. The Sechelt government has become a much more comprehensive part of the federal system. It is no longer the anomaly that *Indian Act* bands are. It is not precariously and irregularly set in a framework that was designed only with other levels of government in mind. To the contrary, it is securely nested in between the federal and provincial governments. The relationship of Sechelt government to its own members, non-Indians, the provincial government, and the federal government has been clearly worked out. Sechelt now has a fully operative status as a well-empowered federal and provincial municipality. The Sechelt initiative *is* an important model. As John Taylor, consultant to the Province of British Columbia on the Sechelt initiative, has noted:

> British Columbia favours the concept of self-government for its Indian people, and is happy to have co-operated with the Sechelt Indian Band and the federal government in working out an agreement for self-government.
>
> This self-governmental model is not only the first of its kind in British Columbia, but in Canada as well. However, this need not be the only model.... Aboriginal governments should be modelled along the lines of local governments and should, to the extent possible, fit into each province's system of local government.

The Sechelt model is one that shows how Indian governments can function as municipal-style governments, as part of a federal and provincial government system. It is a model that shows how the land and the community self-government questions may be detached. It is a model that indicates how Indian self-government may be legislated within the existing federal system, in a comprehensive manner, and not just an ad hoc, issue-to-issue manner. It is important to recognize, however, that it is *not* the model to which many Indian governments have been aspiring when they have referred to *real*

Indian government, to *true* Indian government. Indian governments want and need Sechelt style governing powers, but they want much more. They want to be recognized as First Nations governments, which owe their authority to no one but themselves and their creator.

Viewed from any perspective, the Sechelt initiative raises some critical questions. What are the implications for Indian governments of becoming part of the federal-provincial framework via legislation only? What are the implications for other Indian governments who may decide to take part in comprehensive, community-based negotiations concerning the delegation of federal and provincial powers? Can Indian governments live with the federal and provincial governments without constitutionally independent powers? Are delegated powers a strong enough basis for government in practice? The Sechelt initiative is still too recent to provide answers to these questions. For an insight into such answers, we must turn to the experiences of the Cree peoples of James Bay.

## The James Bay Cree: Indian Governments and Provincial Jurisdiction

With all the publicity about Sechelt, it is sometimes forgotten that the *Cree-Naskapi (of Quebec) Act* of 1984 was the first instance of special legislation by the federal government regarding band self-government. Moreover, the *James Bay and Northern Quebec Agreement (J.B.N.Q.A)* of 1975 and the *Northeastern Quebec Agreement* of 1978 contained many provisions which affected self-government in the James Bay Cree, northern Quebec Inuit, and northeastern Quebec Naskapi regions (Cassidy & Dale). The implementation of this legislation and these agreements reveals a great deal about the implications of wide-ranging self-government arrangements that are formalized in special legislation and comprehensive land claims agreements, particularly with regard to resulting intergovernmental relationships and the jurisdictional responsibilities of the governments involved. While the Inuit as well as the Cree were a party to the *J.B.N.Q.A.* and the Naskapi as well as the Cree are subject to the special legislation, in this context only the Cree will be examined.

The *J.B.N.Q.A.* may be called the first modern treaty. It is a comprehensive land claims agreement, and it is also an agreement concerning the development of resources in the James Bay and northern Quebec region. This agreement grew out of the dispute concerning the Province of Quebec's intention to flood a large area of northern Quebec for hydroelectric development (La Rusic). The approximately eleven thousand Cree and Inuit people in the area, historically distinct peoples who are treated separately in the agreement, raised many objections to the development and asserted their aboriginal title over the lands involved (Richardson). Under pressure from the courts and the media for a settlement of the dispute, the agreement was reached and finally signed in November 1975. The Cree and Inuit gave up all claim to their aboriginal title and rights; in return they received clear rights, benefits, and guarantees under Canadian law. The financial compensation to the Cree and Inuit totalled approximately $225 million. A land regime was established in which the native peoples were awarded various degrees of ownership and control as well as a range of special rights. In addition, a wide array of local and regional governments were established (Dussault & Borgrat).

The *J.B.N.Q.A.* and its implementation has had many benefits for the Cree communities involved (Schillen). A trappers and hunters' regime has been established, and it has contributed to a strengthening of the traditional economic pursuits and lifestyle of the Cree (La Rusic). Housing, community infrastructure, health care, social, and educational services have improved greatly, although it should be noted that these improvements started from a very low base. There is less unemployment and dependency on social assistance. Fewer young Cree leave for good, once they have gained an education. Now they stay or return to their communities, often working in positions that contribute directly to community well-being. All these benefits and more have come out of the Agreement and its implementation. They have not come automatically, however; they have been the result of intense political activity and strong leadership on the part of the Cree (MacGregor). Self-government has not been given or granted to them. They have had to gain it. To understand how they have done so, it is necessary first to understand the political and bureaucratic regime created by the Agreement.

According to the Agreement, the lands involved are divided into three categories. Category I lands, for the most part, are owned by Cree community corporations, with membership in these corporations being accorded to those who are eligible as beneficiaries under the Agreement. Within these lands, the Cree have timber rights, but mineral and subsurface rights are retained by the province. These lands are further divided into Category I-A and I-B lands. Category I-A lands remain under federal jurisdiction. Category I-B are under provincial jurisdiction.

All the rest of the lands included in the Agreement are classified as Category II and III lands. Category II lands are of a greater extent than Category I. On these lands, the Cree may exercise exclusive hunting, fishing, and trapping rights. These lands may be expropriated at any time, without the consent of the affected native peoples, although compensation must be provided. Category III lands cover the largest part of northern Quebec. These lands have the status of provincial Crown lands, and they are governed by the provincial legislation for such lands.

To a large extent, the *J.B.N.Q.A.* may be seen as a self-government charter. A wide range of development and environmental protection panels and committees have been established as a result of the Agreement (Department of Fisheries and Oceans Canada et al.). Each of these has representation from Cree governments. These governments are, to some extent, created by the Agreement, although Sections 9 and 10 provide for the federal and provincial governments to establish governments for category I-A and I-B lands respectively. The provincial *Cities and Towns Act* applies to I-B lands, but the federal government has the responsibility of developing special legislation for I-A lands. This legislation, the *Cree-Naskapi (of Quebec) Act*, was eventually passed in 1984, nine years after the Agreement was reached.

Much like the Sechelt legislation, the *Cree-Naskapi (of Quebec) Act* restores some measure of local self-government to the Indian communities concerned. The *Indian Act* no longer applies to the governance of these communities, and INAC has a sharply reduced role in relation to them. As a replacement, the eight Cree communities and the one Naskapi community each have Federal Band Corporations, which are legal entities and may enter into contracts and assume legal obligations, subject to those restrictions established by the Act. The most significant restriction limits a band's commercial activity to the management of its land and resources, the buildings or assets on the land, and the provision of services to the lands.

Generally speaking, the Cree-Naskapi community governments are provided with approximately the same range of authority that the Sechelt Band has as the result of its special federal legislation. In case of inconsistency or conflict, the *Cree-Naskapi (of Quebec) Act* prevails over other acts of Parliament, except for the *James Bay and Northern Quebec Native Claims Settlement Act*, the federal legislation that authorized the Agreement for its purposes. Provincial laws of general application do not apply where there is inconsistency or conflict with the *Cree-Naskapi Act*. Unlike the *Sechelt Act*, the Cree-Naskapi legislation does not empower the affected Indian government with the delegated authority to make a constitution. The basic arrangements concerning Cree-Naskapi governments are all part of the legislation, a much longer and more complicated document than the Sechelt legislation.

As far as the municipal aspects of government are concerned, in their essentials the Sechelt and the Cree-Naskapi acts are not that different. In relation to the subjects of their jurisdiction, the Sechelt may be somewhat more substantial, since it provides for governing powers over non-native lessees on Sechelt lands. For the Cree-Naskapi, this is not an issue because of the absence of the extensive leasing arrangements that characterize Sechelt lands.

As Wendy Moss has noted, the Cree-Naskapi governments established by the special legislation "have been created in the conventional form of municipal governments," although they "do possess a few limited but extraordinary powers (for example, over hunting and fishing rights, and over the environment)" (Moss, 1985). The powers of the Cree band governments are supplemented by those of other governing entities established by the *J.B.N.Q.A.*, such as the Cree Regional Authority, the Cree Regional Board of Health Services and Social Services, and the Cree School Board. These entities exercise delegated provincial jurisdiction (O'Reilly). This aspect of the Cree arrangements reflects a very important difference between the Cree-Naskapi and the Sechelt models. As a result of its legislation, Sechelt is left with the option of developing many of its intergovernmental arrangements according to its own wishes to a much more significant degree. Its government may negotiate arrangements, which can be tied to either the federal or provincial government or both, for governing functions such as health, education, and social services. The Cree-Naskapi do not have this option. To a much greater extent, they are tied to the provincial government in relation to these functions.

It has been said that the *Cree-Naskapi (of Quebec) Act* is a stronger instrument of self-government than the *Sechelt Act*. There is a justifiable basis to this assertion. Unlike the Sechelt legislation, the Cree-Naskapi legislation is a supplement to comprehensive land claims agreements, which are entrenched in the Constitution and which grant additional self-governing powers, particularly in relation to resource management and development. Although the federal government holds a different interpretation, the Crees maintain that the constitutional protection for their governing authority goes even further. As James O'Reilly, a key Cree legal advisor, notes:

> It is true that the . . . Act . . . is a statute of Parliament. Nonetheless, the Crees argue that under Section 35 of the *Constitution Act, 1982*, they now

> have a constitutional right to self-government.... Consequently... Parliament cannot unilaterally amend the Act... in a manner unacceptable to the Crees without violating a constitutional obligation.

The *Cree-Naskapi (of Quebec) Act* also contains provisions for the monitoring of its implementation; such provisions are not included in the Sechelt legislation. The Cree-Naskapi Commission (1986) is established under Section 158 of the Act. Broadly conceived, the Commission's role is to investigate any representation submitted to it relating to the implementation of the Act. The Commission is empowered to investigate and recommend corrective action in relation to complaints emanating from individual band members, bands, and the federal government.

It is the intergovernmental setting established by the *Cree-Naskapi (of Quebec) Act* and the prior land claims agreements that may provide the most interesting lessons for those who wish to understand Indian government in practice. The Cree-Naskapi arrangements raise many important questions about comprehensive self-government arrangements, particularly with regard to the involvement of provincial governments. What happens, it might be asked, when the federal government transfers some or all of its jurisdiction over Indians and Indian lands to a province? Answers to this question will vary depending on the province, the traditions and aspirations of the Indian government or governments involved, and a number of other factors, including the character of the negotiation process, funding arrangements, and the administrative competence of those involved. Beyond this diversity, patterns will emerge because of the character of the Canadian federal system, and it is clear that such patterns have emerged in Quebec since the *Cree-Naskapi (of Quebec) Act* was passed in 1985. Developments related to the funding of health and social services and the effects of these developments on the emergence of self-government in the Cree-Naskapi territories provide a good example.

As Wendy Moss (1981) has pointed out, five years after the *James Bay Agreement* was signed, "serious health crises, involving epidemics of gastroenteritis and other problems, were becoming an annual occurrence in several James Bay communities." A number of children died in 1981 as a result of poor water and sanitation services. The Cree identified the cause of these difficulties as a failure on the part of the governments of Canada and Quebec to fulfil their obligations under the Agreement, particularly in the areas of social and economic development. Despite what the Cree interpreted in the Agreement as clear statements concerning the responsibilities of government to provide essential sanitation and health services as well as community infrastructure, "many communities still suffered from severe housing shortages and a lack of sewage disposal systems and running water" (Moss, 1981).

These problems were not new. They were, the Cree maintained, the result of a "long-standing neglect by government" (Cree Regional Authority). Before the Agreement had been signed, the activities of the federal and provincial governments in the field of health and social services were minimal by any standards (MacGregor). At that time, the provision of health services to the Cree communities was a federal responsibility. What services there were had been provided through the federal Department of National Health and Welfare. There was also a provincially incorporated hospital in one community (Cree Regional Authority). The signing of the Agreement was to change all of this.

Section 14 of the Agreement provides for the establishment by Quebec of the Cree Board of Health and Social Services of James Bay in order to exercise the powers and functions of a Regional Council within the meaning of the relevant provincial legislation respecting health and social services (Dussalt and Boyeat). This board has the responsibility for the administration of all health and social services throughout most of Cree Category I lands and part of Cree Category II lands, an area encompassing both native and non-native populations. It is composed of representatives of the Cree communities and the Cree Regional Authority, designed to combine "the functions of a regional health council, a hospital centre, a local community service centre, a social service centre, and a reception centre" (Cree Regional Authority).

Other parts of the Agreement were also intended to have an effect on the health and social development of the Cree. For instance, Section 28 provides that Canada and Quebec jointly provide essential sanitation services to the Cree communities. This section has given rise to particular controversy (INAC, 1982). The Cree maintained they could reserve their option to have such services provided by the federal rather than the provincial government until such time as full provincial funding for health and social services was in place. The federal government disagreed. It did not see provincial involvement as an option; it saw such involvement as an unalterable fact. It asserted that the transfer of many of its responsibilities to Quebec was a nonchangeable part of the arrangements. It maintained, for instance, that it was legally obliged by the terms of Section 14 to remove federal services from any Cree communities still receiving them by March 31, 1981. This, from the Cree perspective, was not a valid viewpoint. The Cree government was worried about the province's commitment to providing adequate funding. The Cree, the federal, and the provincial governments all had substantially different views of the meaning of the Agreement with reference to this and other matters (INAC, 1982).

One of the key problems that all the parties to the James Bay Agreement have had to deal with since 1976 is the lack of clarity in the Agreement itself. The document was prepared and finalized under intense pressure as the full hydroelectric project awaited an agreement with the Cree and Inuit. The result was that each of the parties agreed to parts of the document they did not fully comprehend or they were unclear about or on which they held views that were not the same as the views of other signatories. The openness of the document to many different and often conflicting interpretations was confirmed by the findings of the federally commissioned *Tait Report* on the implementation of the Agreement (INAC, 1982). Many of the key obligations assumed by Canada, the *Tait Report* noted, were worded in such a way as to give the federal government "wide discretion" in responding to them. Indeed, important provisions of the Agreement were not specific enough to commit Canada to specific levels of funding or service or to particular goals by particular dates. "Most people involved in the negotiating of the wording," the *Tait Report* concluded, "felt strongly that they knew what it meant and that in their view the meaning was clear. Unfortunately, their interpretations varied" (INAC, 1982).

Disputes about the responsibilities of various governments under the *James Bay Agreement* have had a negative impact on the quality of health and social services in the region. After the signing of the Agreement, for example, the Cree Health and Social Services Board was to be immediately constituted. In anticipation of this event, elections for a provisional board were held by the Cree during the summer of 1976. The board was not formally established by Quebec until April, 1978, however. This was just the first of a series of grievances that the Cree had with the Governments of Quebec and Canada concerning the implementation of this aspect of the Agreement. As one commentator saw it: "Problems with the federal government relate to Ottawa's eagerness to get out of the 'Indian Business.' On the other hand, Quebec frequently ties the performance of its obligations to the exercise of provincial authority in and over the Cree communities" (Moss, 1981). From the Cree perspective, Quebec was more interested in asserting such authority than in providing adequate services or living up to its agreements under the Agreement.

As Cree spokespersons later noted, from their perspective, they gave up 400,000 square miles of their land to obtain the Agreement and the benefits flowing from it. Or, more symbolically and graphically, as they put it, "We gave up France at the cost of a parking lot in Toronto and we are not about to be short-changed." Had the Cree insisted during their land claims negotiations on a share of the royalties generated from the James Bay Hydro Development Project, they note today, they would have been very rich indeed. To date, over $1 billion in revenues has been produced as a result of the project. Still, they believe that the Agreement has been "a good one and that important parts of it are working" (Moss, 1981). They also believe that they have been consistently shortchanged, particularly in reference to health and social services. Their only recourse has been public pressure and lobbying. As a key advisor to the Cree Regional Authority maintained in 1986:

> It has been a fight every inch of the way. During the implementation phase, the federal government has virtually attempted to renegotiate the agreement, to cut down on the level of financial commitment to the Crees. Whenever there is progress, it has been on the initiative of the Crees with the federal government dragging its feet. Often it has involved resort to the courts. . . . At times the media has been the key. . . .

And, as another commentator has argued: "The danger of transferring jurisdiction over native affairs to a provincial government has become evident" (Moss, 1985).

In the eyes of the Cree, the provincial government has, in recent years, improved its performance. They assert, however, that this performance is still far from acceptable. The Cree have also continued to be concerned about the performance of the federal government. After initial high hopes regarding the outcomes of the *Cree-Naskapi (of Quebec) Act*, they have been disappointed by their perception that the federal government has failed to live up to its financial commitments in relation to this Act. In transferring some of its responsibilities for Indians and Indian lands to Quebec, the Crees feel the federal government has decided, if not declared, that some of its responsibilities under the Constitution are now the business of the province rather than itself. This, the Cree assert, cannot and should not be the case.

Since 1980, the James Bay Cree "have mounted and maintained an intensive and well-organized lobby in Ottawa, across the nation, and even overseas (at the United Nations, and at the World Health Organization in Geneva) to enlist support and to exert as much pressure as possible upon both levels of government" (Moss, 1985).

In 1981, this kind of pressure influenced the House of Commons Indian Affairs Committee to endorse the Cree charges concerning government failures in implementing the *James Bay Agreement*, particularly in relation to health and social services. In 1982, the federal Cabinet decided that it must grant additional funds to both the Cree and the Inuit to compensate for what might be perceived as prior violations of the Agreement and to assist in dealing with ongoing problems on the community level.

Over a five-year period, $32.34 million was allocated to the Cree for "past and present construction of infrastructure to improve essential sanitation services, for construction of electric supply facilities, for construction of houses in Cree communities, for repayment to the Crees of certain health care expenditures, for core funding for the Cree Regional Authority, and for certain aspects of the implementation of the Agreement by the Crees" (Moss, 1985). The Inuit were granted approximately $29 million for similar purposes. Neither group was totally satisfied with the sums involved. They both believed that the unmet monetary responsibilities of the federal government and the needs in their communities were much more extensive than had been recognized by the federal government. Nevertheless, they maintained they had scored a victory in their pursuit of the kind of funding arrangements that would facilitate their movement toward self-government.

Many health and social problems continue to plague the James Bay Cree. Much of the population, for instance, is seasonally exposed to methyl-mercury of environmental origin. The Cree Regional Authority believes the levels of exposure are dangerous both to the people involved and to unborn children. This problem, it asserts, is largely caused by an increase in mercury levels in the food chain as a result of the hydroelectric project (Cree Regional Authority). The Cree continue to fight against these as well as other health and social problems as they attempt to reassert more control over their territories and communities.

The experiences of the James Bay Cree provide many lessons concerning the implications of comprehensive arrangements for Indian government in practice. One of the most important of these is that contradictory views of the intergovernmental setting of Indian governments can make day-to-day relations difficult, because comprehensive arrangements require extensive intergovernmental interaction. Indian governments, because of their claim to inherent jurisdiction, want to deal with the Government of Canada on a government-to-government basis. If they interact with provincial governments at all, they want to interact on the same basis, as one relatively independent government interacting with another. The provincial and federal governments want to deal with Indian governments on an administrative level, as one set of bureaucracies interacting with other bureaucracies within the existing Canadian federal-provincial framework. These perspectives are not complementary, and they are not likely to change without a constitutional entrenchment of the right to Indian government.

The James Bay Cree experience also indicates that arrangements concerning Indian governments, particularly those that are based on special legislation between various levels of governments, need to be as clear and precise as possible. Ambiguous agreements, no matter how attractive they may seem as a short-run response to perplexing problems, only give rise to on-going conflict, frustrations, and negative relationships. This being said, it is important to recognize that comprehensive agreements, no matter how specific and precise and no matter how legal, are not final documents in the sense that they once and for all determine the responses to a set of issues or commitments on the part of the various interests involved. Comprehensive agreements are part of a dynamic process in which different interests combine and collide. The more specific these documents are, the better, but they can never be specific enough. They are made as much in the implementation stage as they are in negotiations and legislation.

The James Bay case holds other lessons. It indicates that there is a need to establish mechanisms that can monitor and foster implementation of comprehensive arrangements in an on-going manner. Agreements do not implement themselves. They are implemented by parties with different and often conflicting interests. Some of these parties have more power than others. The less powerful in particular need to have access to authoritative implementation mechanisms, such as neutral commissions or annual review teams.

Indian governments must use a variety of tactics and strategies if they are to make it more likely that other governments live up to the commitments that they make in agreements and, in particular, continue to recognize the authority within Indian communities. It is frequently necessary for Indian governments to use the media or the courts to bring political pressure to bear. While it is important to have a good, clear, precise agreement, it is just as important to have an agreement implementation strategy.

Perhaps the most important lesson to be learned from the James Bay Cree experience with comprehensive self-government arrangements is that Indian governments need to be very cautious about arrangements that involve a transfer of federal responsibilities to provincial jurisdiction. Provinces do not historically have the same kind of relationships to Indians and Indian lands that the federal government has. Provinces do have existing and functioning frameworks for service delivery and local government. As Quebec has in the Cree case and, indeed, as British Columbia has in relation to the Sechelt initiative, provincial governments will seek to ensure that Indian governments become part of the local and regional governing frameworks. They will not be very ready to accept Indian governments as First Nations governments, as equal partners with independent powers.

This does not mean that Indian governments should ignore provincial governments or eschew municipal-style powers. If they want to provide necessary services to their citizens, they must frequently interact with provincial governments and provide municipal (as well as other) services. This is one clear lesson arising from the development of Indian government in practice. As Indian governments interact with provincial governments, however, they must remember that differences in perspective on matters of principle will continue. A further lesson may be that each of these governments, as well as the federal government, may have to focus on practical matters where agreements can be reached without asking for or claiming any concessions in principle.

## Comprehensive Arrangements: an Experiment

The Sechelt and the James Bay Cree are two Indian peoples who have participated in comprehensive arrangements with the federal and provincial governments concerning their governments, in general, and the delegation of federal and provincial jurisdictional powers, in particular.

Evidence to date indicates that Indian governments can achieve much through engaging in specific, community-based negotiations that lead to special legislation, or in a limited number of cases, comprehensive land claims agreements. To an extent, Indian governments can use such arrangements to clarify their roles in the federal-provincial system. They can obtain formal guarantees concerning funding levels and expectations. They can gain more power over many community services and programs.

They can do all of this within the scope of delegated federal and provincial powers; but just as they can gain, they can lose. As a result of comprehensive arrangements Indian governments do not necessarily have to—but, as the James Bay Cree did to an extent, they can—lose the flexibility to deal with the federal and/or provincial governments on a government-to-government basis. This may be especially the case as they seek to negotiate particular arrangements concerning specific services needed by their citizens. They can open the door to further questions and doubts concerning the federal government's fiduciary and trust responsibilities. They can lock themselves into arrangements that may unfold in unpredictable and unsatisfactory ways. They can find themselves with self-government regimes that do not correspond to their own definitions of self-government.

Comprehensive arrangements, at the present time, must be regarded as experiments aimed at more fully integrating Indian governments within the federal system. Both time and a larger number of examples will be necessary to ultimately evaluate this approach.

# 8

# Indian Government in a Federal System

Indian peoples and their governments have been quite clear about what they want from Canada. They want constitutional recognition of the inherent jurisdiction of their governments. They want to deal with Canada as First Nations on a government-to-government basis. They want an understanding of their diversity as well as their unique cultural and linguistic identities. They want a just settlement of their grievances concerning their traditional lands as well as compensation for past wrongs and due attention to the special status in law that arises from their aboriginal rights. They want to govern themselves. Their wishes have not been recognized.

## Indian Governments: A Political Reality

Canadian federalism remains as it has been, a system with two authoritative orders of government, the federal and the provincial. For the most part, Indian governments are perceived to be a creature of federal and, in some cases, provincial legislation, and these arrangements are seen as a matter of administrative convenience, not of special rights or powers. Indian peoples are not perceived as citizens of First Nations. Assimilation and not recognition is still the order of the day.

In the face of this situation, Indian governments have tended to operate on two levels. In relation to the practical matters of governance—citizenship, policy-making, service production and delivery, and financing—Indian governments have continued to assert their view of themselves as a third order of government with relatively autonomous jurisdiction. At the same time, they have engaged in many activities and agreements with other governments. Such arrangements are based, as far as those governments are concerned, on delegated federal and provincial powers. Such arrangements have grown despite a lack of consensus between Indian and non-Indian governments on general matters.

This, then, is the emerging nature of Indian government in practice: while seeking a change in the basic design of Canadian federalism, Indian peoples and their governments have taken advantage of the possibilities in the current federal-provincial framework to realize and extend their vision of Indian government. They have done so as a response to the promise and the reality of Canadian federalism. In the short run, such a strategy makes sense. In the long run, its limitations must be addressed.

Arguments about the jurisdiction of Indian governments are reflected in political reality. In some cases, Indian governments simply accept the authority of the federal and provincial governments. In others, they ignore it. In many instances, they "accept" federal and provincial jurisdiction for specific and practical purposes, but they do so while continuing to assert their own independent and inherent powers. They do so because their citizens need certain services. Children need to go to school. Sick people need medical care. All people need housing and community services. Fish need to be managed; so, too, do forests and zoned lands. Indian governments cannot ignore the immediacy of these needs as they seek recognition of their inherent political authority within the Canadian federal system.

Such strategies, more or less developed, characterize the operations of many Indian governments. The Dakota Ojibway Tribal Council (DOTC), for instance, sees itself as promoting Indian self-government which leads to eventual self-determination. While seeking to bring about a full form of Indian government, the DOTC accepts the constraints of Canadian law, both federal and provincial, for the practical purposes of government. So, for example, the DOTC is currently an incorporated body under legislation of the Province of Manitoba. It maintains a police force that operates under the Manitoba *Police Act*, and it administers a child welfare program that is also empowered under Manitoba legislation.

The DOTC is not the only Indian government to assert inherent and independent jurisdiction on one level, while accepting and implementing delegated jurisdiction on another. The Blood Tribe, the Saddle Lake, Alexander, and Goodfish Lake Bands do so in Alberta. So, too, do the Nuu-chah-nulth, Shuswap Nation, Gitksan-Wet'suwet'en, Nisga'a, and Carrier Sekani Tribal Councils, as well as the Katzie, Squamish, and Kamloops Bands, in British Columbia. So, too, do the Mohawks of Kahnawake and the James Bay Cree in Quebec. So, too, do the Walpole Island and Six Nations Bands in Ontario. So, too, do all of the governments investigated in the course of this study.

The assertion of independence and an unfettered right to self-determination, on the one hand, and the day-to-day acceptance of federal and provincial laws and bureaucratic structures, on the other, may be seen as contradictory on the part of Indian people, or as an expression of pure rhetoric tempered by a measure of realism. What may not be seen is a consistent characteristic of Indian government in practice: the perspectives and strategic positioning that lie behind such an approach to the matter of governance.

Quite frequently, Indian governments will take whatever federal and provincial jurisdiction they can take, as a way of providing for the practical realization of their inherent jurisdiction in circumstances where other governments refuse to recognize such jurisdiction. They will, in fact, seek to enforce their own jurisdiction by bringing to bear the full power of Canadian governments that deny this jurisdiction. They do so as a strategy for countering the efforts of these governments to deprive Indian governments of any powers that do not originate in the existing federal-provincial order.

Indian governments are not the only governments that engage in such strategies. The federal and, particularly, the provincial governments sometimes accept, for very pragmatic reasons, broad interpretations of the specific powers of Indian governments, thus enabling those governments to exercise powers that are not recognized in principle. The Province of Quebec, for instance, is very hesitant to interfere with the Peacekeepers, the community police force of the Mohawks of Kahnawake. It often stands by and allows the government of Kahnawake to exercise police-keeping powers that are beyond those formally recognized in law. The Province of British Columbia allows the Nuu-chah-nulth and the Carrier Sekani Tribal Councils, and the bands these tribal councils represent, a much greater degree of latitude in relation to the administration of child welfare programs than is more commonly the case. Many similar examples could be cited. Many have been cited in this book.

Frequently, one act or set of activities by Indian governments is perceived and interpreted in two or more different ways by these governments and by the federal or provincial governments. Indian governments, for example, may and often do see community police forces as having powers which are traditional in nature, which are delegated to them by the citizens in their communities. It is these citizens, they argue, who must determine the sphere of authority of a police force as well as the matters of who is subject to its authority and how this authority may be reconciled with the authority of other Canadian governments. The federal and provincial governments have a very different view. They assume policing powers in Indian communities to be ones they have delegated to the "junior" governments in these communities.

The jurisdictional power to maintain services such as policing and child welfare is a matter of principle. It is also a practical question.

Despite varying viewpoints, the governing function of policing must be maintained. Policing may or may not be carried on in an adequate or appropriate manner from one perspective or another, but it must continue, if a semblance of law and order is to be maintained. This need for peacekeeping services is not suspended because of disputes about who is responsible for or subject to them. Accordingly, the jurisdiction of Indian governments often becomes a subject of practical implementation amidst principled dispute.

Such patterns are fine, to a point. The development of Indian government in practice has proceeded at an accelerating pace; but without recognition at the constitutional level of the powers of First Nations governments, the activities and aspirations of Indian governments will increasingly lead to frustration and conflict. With the continuance of the trend toward a fuller expression of Indian government and the Indian assertion of jurisdictional powers, the incidence of interjurisdictional disputes is sure to accelerate. There will be more disputes between the federal and provincial governments as, for example, provinces assert their jurisdictional powers on matters such as natural resource management and development. Indian governments will persist in putting forward their independent authority in relation to such concerns, and at times, because of its responsibilities towards Indians, the federal government will be required to advocate the interests of Indian communities in relation to these matters. Moreover, the federal government will often assert its authority because of its own concerns on matters such as trade and regional economic development. At many points, the federal government itself will engage in disputes with Indian governments.

It might be argued that the reality of Indian governments in practice presents dilemmas that are a reflection of the nature of Canadian federalism, of a system in which the federal and the provincial governments have somewhat independent powers which they are reluctant to share with one another or with other governments such as those of Indian peoples (Boldt & Long, 1986). It also might be argued that the doctrine of ministerial responsibility, as applied to Indian affairs, can leave little room for powers to be independently exerted by Indian governments. Under that doctrine, Ministers of the Crown ultimately must be responsible for all activities of government. It still might be further argued, however, that federalism can provide a good part of the basis for a fuller accommodation of Indian governments.

It is federalism itself which may, in the final analysis, provide an institutional basis for the fuller integration of Indian governments and the Canadian political order, an integration which could take place, to a very significant degree, on the terms desired by Indian governments. To understand such an argument, it is first of all necessary to understand federal systems as well as Canada's particular federal model and, in this light, to view current federal practice in relation to Indian peoples and their governments. Once this is done the potential to revamp that practice in the light of federal principles can be identified.

## The Federal System and Indian Governments

A federal system is one in which several governments simultaneously govern in the same territorial domain. There are four critical features of federal systems. First, there is a division of jurisdiction among governments; that is, different governments, in Canada's case the national and provincial governments, have jurisdiction over different functions. This does not mean that there is no overlapping of responsibilities, but it does mean that jurisdiction is divided in a fundamental manner, not simply delegated by one government to another.

A second key feature of federalism is that the division of jurisdiction among governments is well understood. It is usually provided for in a constitution that requires the consent of representatives of different governments to amend or modify. If any single government could amend the constitution unilaterally the system would not be federal but would be a unitary one. It would be dominated by a single government.

A third feature of federal systems is that citizens have a voice in and are subject to more than one government. Thus citizens are citizens in more than one government simultaneously—with different governments possessing jurisdiction over different public functions. This characteristic of multiple citizenship differentiates a federal system from a confederation, where citizens are primarily citizens in one government, and that government in turn interacts with a larger government instead of citizens doing so directly.

A fourth characteristic of federal systems is a system of courts where these courts have jurisdiction to adjudicate on constitutional disputes among governments, with no single government having the authority to overrule court decisions. Courts may also have the authority to enforce constitutional provisions on governments in relation to individual citizens, to enforce, for example, a charter of rights against government violations.

These four characteristics of federal systems are interdependent.

As such, they affect the nature of citizenship and jurisdiction. Essentially individuals are citizens in more than one government simultaneously. Governments possess different jurisdictional powers, as assigned in a constitution that is enforceable in an adjudicatory forum. Accordingly, federal systems are based on checks and balances among governments, and there is no single government that is truly sovereign over all areas of jurisdiction.

Canada possesses all four characteristics of a federal system, with a division of jurisdiction between the national and provincial governments; with a constitution setting out the division of jurisdiction; with citizens electing representatives, benefitting from programs, and being directly subject to laws from both levels of government; and with a court system that has jurisdiction to enforce the constitution among governments and between citizens and governments.

It is anticipated that within federal systems there will be considerable interaction among governments as well as between citizens and their governments. Governments will develop cooperative programs and delegate jurisdiction from one to another. It is also anticipated that there will be rivalry and competition among governments as officials compete for citizen loyalty or to expand their jurisdiction vis-à-vis other governments. Where disputes arise the courts adjudicate. Thus federal systems are complex political systems with a multiplicity of relationships among different units.

Within federal systems, governments may adopt different internal organizational arrangements. They may take, for instance, the characteristics of a Westminster parliamentary system, where a first minister, cabinet, and legislature control specific government agencies and have final authority; or they may be designed with a separation of powers internally as with the former English division of authority among Crown, Lords, and Commons or with a United States style division between the executive, legislature or legislatures, and the courts.

In Canada the national government represents a combination of these approaches. Many citizens and political analysts view the Canadian federal government as a Prime Minister and Cabinet dominated House of Commons government, as a government structured along the lines of the Westminster model. From this perspective, Senate or court imposed constraints may be and often are seen as essentially illegitimate. Others who view the Canadian federal government are more favourably disposed to the division of powers among the Commons, Senate, and courts. Meanwhile, provincial governments are organized as Westminster parliamentary systems with single legislatures.

Both the federal and provincial governments in Canada decentralize to create organizations which function independently on a day-to-day basis but over which they have ultimate control. The most prominent decentralized creations of the federal government are Crown corporations. Provincial governments also create Crown corporations, and all provinces have created systems of local government, with varying degrees of jurisdictional authority delegated through provincial legislation.

In many ways, the Canadian system is much more like a federal system of government than it is a classic Westminster parliamentary system where ultimate jurisdiction resides in a single institution—the national legislature—although there remains a considerable focus in Canadian political science on the parliamentary characteristics, in contrast to the federal characteristics, of Canadian government. The tensions in the Canadian governing system between the federalist and the Westminster models of government are especially obvious in many issues surrounding Indian governments.

Indian governments want to act on an independent basis as they act with regard to and as agents of their citizens. They want a clear recognition that certain functions of governance in relation to Indian people are theirs and belong to no one else. Such aspirations could be accommodated within a federal system such as Canada's, but they have not been.

At present, Indian governments are a part of the Canadian national government; they are not a self-governing part of the Canadian federal system. Under current Canadian law, Indian governments, in their simplest legal sense, are creations of national government legislation; they are agents of and responsible to a Minister of the Crown and the federal cabinet. *Indian Act* band councils do not even possess corporate status, as do Crown corporations or local governments created by provincial legislation; thus band councils under statute are simple administrative arms of the federal government. From this perspective, the jurisdiction Indian governments possess is delegated, and may be revoked, by the federal government. Moreover, the lack of corporate status for Indian governments means that these governments cannot generally bring cases to court or be party to court decisions to resolve disputes with other governments.

The ability of Indian governments to function as full partners in the Canadian federal system also has been impaired by a lack of recognition of the fact that Indian peoples are citizens in their own governments. There is no reason why Indian people holding Canadian citizenship and full citizenship in their own First Nations governments could not be citizens in a truly federal sense: interacting as full citizens with all levels of government, federal, provincial, and Indian.

Thus we are confronted with an irony. Federalism can accommodate different governments. It allows for a recognized basis for independent powers. It enables citizens to be citizens of two or more governments simultaneously. It uses judicial institutions as mediating mechanisms for disputes between citizens and governments as well as those between one government and another. Federalism, in fact, is characterized by all of these conventions; yet Canadian federalism, as practised, particularly in light of the Westminster model, has not accommodated fully recognized Indian government on the part of Indian peoples.

### The Recognition of Indian Government in Principle

One approach to Indian government, and perhaps the only approach that will fully meet the aspirations of Indian peoples, would be to accommodate fully recognized Indian government as a third order of government within the Canadian federal system. This can be done without violating the fundamental traditions of Canadian common and constitutional law, as generally applied.

If one thinks about Indian government within the Westminster model and current federal-provincial arrangements, Indian governments must always remain with delegated authority only. From the perspective of Indian peoples, to do so is to have their governments relegated to the status of subordinate governments, with their members serving as subjects, not citizens, under the perpetual rule of a colonial master. Non-Indian Canadians may feel that such rule is benevolent — but that does not make it any more acceptable from an Indian perspective.

It is important to note that there is a good deal more latitude within the current constitutional framework than the federal government has been willing to recognize. In the extreme, it would be conceptually possible for the federal government to provide a significant degree of delegated authority in order to create a system of Indian government that would enable Indian governments to be fairly autonomous, if not fully self-governing in the broadest sense of the term. This is the case primarily in relation to municipal functions. With regard to provincial functions, such an approach would be more difficult because provincial governments would unquestionably have concerns about their own jurisdiction. However, even if the federal and provincial governments were to create somewhat independent Indian municipal governments through special legislation, such governments could not have the full status of equally empowered governments in the Canadian federal system. Delegated powers, however strongly delegated, can be withdrawn or countered by constitutionally established powers in the courts.

Legislated arrangements for Indian governments with delegated powers are insufficient on several counts as an adequate basis for a fully recognized Indian government. First, the arrangements would still allow for the possibility of a federal and in some cases a provincial government veto on important matters where differences with Indian governments arise. Second, they would be specifically separated from a resolution of the Indian land question, either in the form of comprehensive claims or contested treaty obligations. Third, they would not reflect a concept of aboriginal self-government as an aboriginal right that has very special status—in some senses a determining status—when disputes involving other interests arise. Fourth, Indian governments would not be recognized as First Nations governments, as governments that must be dealt with, at some point, on a constitutional basis. And fifth, many of the non-municipal powers that Indian governments can and do exercise would still be matters of unresolved controversy.

The requirements of the Indian view of the inherent and independent jurisdiction of their governments cannot be met by the creation of relatively autonomous Indian governments under federal and provincial authority. Such requirements can only be met by the constitutional entrenchment of a wide right to Indian government. Even then the courts and other intergovernmental arbitration mechanisms would come into play as the need arose to mediate between different constitutionally-based claims, such as those relating to gender-based and self-governing rights. Other limitations on the governing powers of Indian people would also exist, but these powers would be firmly and lastingly established in constitutional law.

In spite of the unwillingness of the federal and provincial governments to agree to the entrenchment of the right to Indian government in the Constitution, it is important to examine the implications of constitutional recognition of the right of self-government and how such a right could be accommodated within the Canadian federal system. It is important because it has been argued that such an effort is not practical. On the contrary, within a federal system, such an effort is not only practical, it is simply an extension of the basic federalist principle of recognizing diversity and accommodating the choices of citizens in relation to governing arrangements. It is an example of federalism in practice.

As they create their governments in practice, Indian peoples are demonstrating which public functions they consider important for their jurisdiction in relation to matters such as education, resource management, social services, health, policing, local services, and economic development. For the most part, the activities Indian peoples claim jurisdiction over are activities where their involvement is already extensive. There is no reason to expect constitutional entrenchment to result in a radical departure from current practice. To a large extent, it should be expected that entrenchment would effect an extension and reinforcement of current practice.

Constitutional recognition of the aboriginal right of self-government would require agreement on which governments have authority over which functions. The current Canadian Constitution provides a reasonably comprehensive division of jurisdiction between the national and provincial governments, and it would be necessary in several dimensions to define what authority Indian governments were to possess. Some substantial authority on the part of Indian governments over Indian lands would have to be recognized, for example. Such authority would extend to matters such as resource development and land-use planning. This authority would apply to anyone, Indian or non-Indian, on those lands. Other authorities of Indian governments might apply to citizens of the Indian governments only, regardless of where these citizens were located. Included might be powers over such things as family law, inheritance, child welfare, and adoptions.

The only aspect of constitutionally recognizing inherent jurisdiction for Indian people that may at first appear anomalous from a Canadian federalist perspective would be the recognition of some kinds of authority of Indian governments over Indian peoples who do not reside on Indian lands. There is no reason why Indian people who chose to reside in a non-Indian community but maintain their Indian government citizenship could not be subject to that First Nations government for functions such as family law while being subject to non-Indian governments for local services, for instance. Similarly, non-Indian people residing on Indian lands could be subject to provincial family law, and, at the same time, the laws of Indian governments for local services.

The recognition that nongeographically-based jurisdiction is necessary for some governing functions is required because Indian people are not simply another ethnic group in a liberal political system. As aboriginal peoples, they possess a separate legal status.

Moreover, there is nothing unusual about nonspatial governments, that is, governments that may assert their powers beyond their physical boundaries. The entire logic of a federal system is that individuals can be citizens of different governments for different purposes—and it is possible to accommodate Indian governments as well as national and provincial governments within such a framework.

Within the Canadian federal framework, the jurisdiction of Indian governments as governing entities separate from the national and provincial governments could be recognized and clearly designated in the Constitution. Indian governments could thereby become more responsive to their citizens and extend their powers in relation to them on and off Indian lands. For dispute resolution, mediating mechanisms, ranging from intergovernmental coordinating committees to federal-provincial First Ministers Conferences, could be developed. Some further refinements in relation to the roles and participation of Indian governments on the provincial and national levels might be necessary if these mechanisms were to work properly, but such refinements would not be that difficult to achieve. The jurisdiction of First Nations governments in principle could be made to conform and extend jurisdiction as it is developing in practice and as it is traditionally in Indian societies. Within a federal system, this is a goal that is achievable.

## Recognized Indian Government in Practice

Once the all-important matter of jurisdiction is dealt with, it is necessary to consider the matters of policy-making, citizenship, service production, and finance.

Indian governments currently exercise considerable policy-making authority on reserve lands and enter into many agreements with other governments and private organizations as they do so. Constitutional recognition of inherent jurisdiction would provide some significant differences with regard to how policy-making is organized and implemented on the part of Indian governments. The recognition of their inherent authority would permit individual Indian governments to much more fully develop their internal decision-making procedures. These procedures would likely show considerable variance across Canada because of widely differing traditions in First Nations communities. They would, however, reflect a strong emphasis on active citizen involvement and the use of consensus. This should not cause concern among Canadians.

Equally important for a change in policy-making processes would be the alterations that would occur in the nature of policy development through intergovernmental relations. Indian governments would have a clear legal status instead of the ambiguous status they now possess. They would be able to enter into a wide range of agreements with other organizations. They would also have a much stronger bargaining position when making agreements. If they were unable to achieve an agreement in an area where they possessed jurisdiction, they could "go it alone" instead of being subject to the authority of a non-Indian government, as is so often the case at present. For dispute resolution, Indian governments would also have direct access to the courts, as do other governments. When matters pertaining to them [illegible] before the courts, they would have certain, clear status for their authority in Canadian as well as aboriginal law.

Citizenship is a matter that can also be clarified by a recognition of the inherent powers of First Nations governments. The recognition of the inherent right to Indian government in the Canadian federal system would not need to result in a situation where only Indian governments could deal with the federal or provincial governments on behalf of Indian citizens. A much more likely outcome of recognition would follow the logic of federal systems. In a true federal system individual Indian people would deal with Indian governments on some issues, but also deal directly with other governments on other issues. Such arrangements would benefit Indian people, as they would have recourse to other governments, including the courts, to protect their individual rights or deal with any abuses of authority by Indian governments toward their own citizens.

Interdependency and cooperation is at the root of the design of federal systems, and it would be reflected in the matter of service production and delivery, if the authority of Indian governments was recognized. As indicated in Chapter 5, there are many current examples of interdependencies and cooperation between Indian and other governments in relation to education, social services, health, policing, and local as well as other services. There is every reason to anticipate that interdependencies in the production and delivery of many government services would not only continue, but would likely increase with the recognition of the inherent right to Indian government. There would probably be an increase in the number of agreements among Indian governments for culturally sensitive services where scale economies existed. An accelerating number of intergovernmental agreements with non-Indian governments could also be anticipated, particularly between Indian and provincial governments, as Indian governments sought to obtain efficient production of a broad range of local services which are less culturally sensitive.

Little mention has been made so far of the role of provincial governments in relation to Indian government. Some of the governmental functions Indians are most concerned with (education, social services, health, policing, and local services) are functions of provincial responsibility within the Canadian federal order. Some of the most successful Indian government initiatives presently involve provincial government ministries working in close cooperation with Indian governments in relation to such functions. Those intergovernmental relations are extremely valuable ones, and provincial government service delivery departments could have a considerably more significant role to play in assisting Indian governments with service production and delivery. The relationships between Indian and provincial governments could be enhanced if the status of Indian governments were clarified, so that more conflictive matters between those governments could be resolved.

It is not clear why provincial governments have not been willing to more aggressively promote Indian government and increased responsibility by Indians over their own affairs. Under constitutionally established Indian government, provincial governments and Indian governments might often find themselves as allies in efforts to sort out their differences with the federal government. In spite of the stated preference of Indian governments to negotiate primarily with the federal government, in the long run accommodations with provincial governments are necessary. Such accommodations, however, are more likely to be achieved if Indian people possess a larger degree of self-government and a firm legal position rather than their current ambiguous status.

Service production and delivery by Indian governments would be affected in other ways by constitutional recognition. With a recognition of their authority, Indian governments would have more of an incentive to provide services as efficiently as possible. When jurisdiction is unambiguous, it is often easier to achieve agreements over production and delivery concerns. In British Columbia, for instance, it appears that Indian bands located outside of but adjacent to municipalities have better relationships with those municipal governments over service delivery arrangements than do those Indian bands located within municipal boundaries, where jurisdiction over many functions including taxation is contentious (Bish, 1987b). This is just one example of a general truth of well-designed federal systems: once it is clear who is responsible, then government officials can get on with delivering programs and resolving problems instead of arguing over who has authority and blaming each other for failures. There is every reason to expect that constitutional recognition of Indian government would lead over time to more integrated and effective service delivery.

Finally, there is the matter of money. The financing of Indian governments as administrative units of the Canadian federal government, with ministerial responsibility for how those funds are expended, while consistent with the Westminster model, is not consistent with the basic principles of Indian government as articulated by Indian people. Nor is it consistent with the recognition of Indian governments within the Canadian federal system. The difference in perspectives between the Indian position — however diverse — and the concept of ministerial responsibility is an obstacle that exists in the way of a mutual accommodation between Indian and non-Indian governments. If Indian governments were recognized as another order of government in the Canadian federal system, however, this obstacle could be clarified and resolved, as federal Ministers of the Crown would be able to exert no more authority over Indian governments than they can over provincial governments.

The Indian perspective on financing Indian governments is unambiguous: Indian peoples have given up Canada's lands and resources to non-Indians, and in exchange, the Canadian government, as the representative of non-Indians, is responsible for financing Indian governments. Such financing should be unconditional and not accompanied by line-item expenditure designations or a myriad of accounting regulations. Indian governments should be responsible to Indian citizens — not to non-Indian governments.

From the perspective of non-Indians, it is less clear what is owed to Indian people. However, when one recognizes that many of the problems Indian peoples have had in sharing in the economic development of the country — including the selection of poor reserve locations; cutting off Indians from traditional livelihoods such as nonreserve-based commercial fisheries and trapping; making it illegal for Indians to own property; and other forms of overt discrimination — are due in large part to policies of non-Indian governments that have been imposed on Indians, it becomes clear that non-Indian Canadians have a considerable debt to Indian peoples.

The most immediate practical approach to the funding of Indian governments appears to be to continue along the lines that INAC's Alternative Funding Arrangements are beginning to develop. That is, based on past funding, to move toward a granting system where Indian governments are responsible for expenditure decisions and where any savings through efficiencies or changed priorities may be used at the discretion of the Indian government. Such an approach is only a start in the direction of properly financing Indian governments. In the not-so-long run, an approach that is based on the principle of equalization would have to be adopted to a much greater extent, and funding should be based on need rather than on past levels of federal expenditures. Many other matters such as taxing powers would have to be worked out. A more appropriate fiscal approach is likely, however, to lead to reduced expenditures in the long run, as it is the approach that gives Indian peoples the greatest incentive to take over responsibility for their own lives and governments.

## Towards Constitutional Entrenchment

Constitutional entrenchment of Indian government would likely provide net benefits for both Indians and non-Indians. The implications of the Indian perspective on self-government in the Canadian political order are certainly not damaging to the existence of that system as a federal one, nor would constitutional entrenchment of Indian government, with a specified range of jurisdiction, be likely to have a negative impact on non-Indians or non-Indian governments. With the legal position of Indian governments firmly established, Indian peoples and their leaders could turn their full efforts toward solving issues relating to the land question and natural resources. They could focus more easily on the day-to-day problems of service delivery and increasing the quality of life for Indian citizens, instead of having to spend their energies lobbying Ottawa for recognition of their aboriginal right to self-government. A more consistent application of the federalist approach to the matter of Indian government would not be a panacea, but it would go a long way towards effectively dealing with many of the issues that Indian peoples have been raising for years.

Constitutional entrenchment could also be of significant benefit to non-Indian governments as they would no longer face the very difficult problem of administering a colonial regime over a subject people. If the federal government wants to maintain jurisdiction over Indians, as in the current constitutional arrangements, it must also expect to bear the financial costs — costs which are likely to be larger than they would be under constitutional entrenchment of

Indian government. This would be the case, not because these costs would be shifted elsewhere, but because it is clear that incentives for Indian people to be assertive in looking after themselves can never be fully developed when Indian people are essentially treated in a legal and political sense as wards in a colonial administration instead of constitutional equals in a federal system.

If their right to full Indian government were recognized, Indians would still have their full rights as Canadian citizens. They would in fact be "citizens plus." It is important to note that recognition would not be on the basis of racial or ethnic characteristics. It would be based on legal status. Indians are not just another ethnic group in the "Canadian Mosaic"; they are members of the First Nations in the Canadian political order. The recognition of a unique status in that political order is not unique. It is part of the history of Quebec's constitutional status, for example. A similar innovation for aboriginal peoples would be the ideal way to show respect for First Nations, provide net benefits for both Indians and non-Indians, and serve as an example of a peaceful, mutual accommodation of diversity to resolve a centuries-old problem.

The ultimate answer to the demand for a fully realized form of Indian government lies in recognition and mutual accommodation, so that Indian governments and their citizens can integrate on an equal basis with the federal and provincial governments within the Canadian federal system. Recognition is in fact a very practical answer to a matter of deep principle. Indian government is developing in practice in Indian communities through the efforts of Indian peoples. The problem is not that Indian government is an impractical notion. It is that Canadians as a whole have not allowed the principles of federalism to maintain pace with its practice—or its possibilities.

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Cover photograph of the elders of Kitwancool use courtesy of the hereditary chiefs and the Royal Britis Columbia Museum.

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